EDITOR'S NOTE

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. 85-499-CFX
atus: GRANTED

Title: B. H. Papasan, Superintendent of Education, et al., Petitioners
v.
Mississippi, et al.

cketed:
ptember 18, 1985

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Freeland III, T.H.

Counsel for respondent: Arnold, R. Lloyd, Slaughter-Harvey, Constance

try	Date	Note	Proceedings and Orders
1	Aug 3 1985		Application for extension of time to file petition and order granting same until September 18, 1985 (White, August 6, 1985).
2	Sep 18 1985	G	Petition for writ of certiorari filed.
4	Oct 10 1985		Order extending time to file response to petition until November 13, 1985.
5	Nov 13 1985		Brief of respondent Mississippi in opposition filed.
6	Nov 13 1985		DISTRIBUTED. November 27, 1985
7	Dec 2 1985		Petition GRANTED.
			**********
9	Jan 3 1986		Order extending time to file brief of petitioner on the merits until January 24, 1986.
0	Jan 24 1986		Joint appendix filed.
1	Jan 24 1986		Brief of petitioner B.H. Papasan, Supt., etc. filed.
2	Feb 10 1986		Record filed.
3	Feb 10 1986		Certified copy of original record and proceedings, 3 volumes, received.
4	Feb 27 1986		Brief of respondent Mississippi filed.
5	Mar 3 1986		Brief of respondent Dick Molpus and Constance Slaughter-Harvey filed.
6	Mar 7 1986	D	Motion of the Attorney General of Mississippi to strike brief of respondents Molpus, et al. filed.
7	Mar 12 1986		DISTRIBUTED. March 21, 1986. (Motion of A.G. of Miss. to strike brief of respondents Molpus, et al.).
8	Mar 14 1986		SET FOR ARGUMENT, Tuesday, April 22, 1986. (3rd case)
9	Mar 14 1986		CIRCULATED.
0	Mar 14 1986		Opposition of Dick Molpus and Constance Slaughter-Harvey to motion of the Attorney General of Mississippi to strike brief of filed.
1	Mar 24 1986		Motion of the Attorney General of Mississippi to strike brief of respondents Molpus, et al. DENIED.
2	Apr 14 1986	X	Reply brief of petitioner B.H. Papasan, Supt., etc. filed.
3	Apr 22 1986		ARGUED.

85-499

NO. 85-

In the Supreme Court of the United States
OCTOBER TERM, 1985

B.H. PAPASAN,
Superintendent of Education, Et Al.
Petitioners

versus

WILLIAM A. ALLAIN,
Governor, State of Mississippi, Et Al.
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May school children be afforded prospective injunctive relief to remedy current conditions resulting from a breach by state officials of the federal school lands trust?

2. Can a discriminatory denial of a minimally adequate free public education to some children constitute a violation of the equal protection clause of the fourteenth amendment?

LISTING OF PARTIES

Petitioners:

B.H. PAPASAN, Superintendent of Public Education, Tunica County School District, Tunica, Mississippi;
WESLEY BAILEY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
JOHN E. MATTHEWS, Board of Education, Tunica County School District, Tunica, Mississippi;
RICHARD HUSSEY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
E.M. HOOD, JR., Member, Board of Education, Tunica County School District, Tunica, Mississippi;
CLIFFORD GRANBERRY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
JAMES E. HATHCOCK, Superintendent, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
JIM YOUNG, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
RUSSELL JACKSON, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
FAITH WEST, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
KELLY TUCKER, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
DON BETHAY, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
TONY V. PARKER, Superintendent of Public Education, Alcorn County School District, Corinth, Mississippi;
H.T. BENDERMAN, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;

RAY HUGHES, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
FRANK ELDRIDGE, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
BOBBY CALDWELL, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
HERSCHEL WILBANKS, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
HOLACE MORRIS, Superintendent, Amory Municipal Separate School District, Amory, Mississippi;
HERMON HESTER, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
DAVID HODO, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
EDDIE WOMBLE, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
W.G. PRUEITT, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
THOMAS GREER, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
DOUGLAS AUTRY, Superintendent of Public Education, Benton County, School District, Ashland, Mississippi;
LAFAY WEATHERLY, Member, Board of Education, Benton County School District, Ashland, Mississippi;
SHIRLEY MOHUNDRO, Member, Board of Education, Benton County School District, Ashland, Mississippi;
MINNIE LEE CHILDERS, Member, Board of Education, Benton County School District, Ashland, Mississippi;
JOHN DAUGHTERY, Member, Board of Education, Benton County School District, Ashland, Mississippi;

JOE GRIST, Member, Board of Education, Benton County School District, Ashland, Mississippi;
GRADY FERGUSON, Superintendent of Education, Calhoun County School District, Pittsboro, Mississippi;
MIKE DUNAGIN, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
BROOKS BRASHER, Member, Board of Education, Calhoun County School District, Pittsboro, Mississisppi;
CHARLIE CLARK, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
CHARLES C. HARDIN, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
PAUL LOWE, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
O. WAYNE GANN, Superintendent, Corinth Municipal Separate School District, Corinth, Mississippi;
GLEN PARKER, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
SARAH HARRIS, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
J.B. DARNELL, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
WILLIE DAVIS, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
JOHN BREWER TOMLINSON, JR., Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
ALBERT L. BROADWAY, Superintendent of Public Education, DeSoto County School District, Hernando, Mississippi;
ROBERT C. DICKEY, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;

HARVEY G. FERGUSON, JR., Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
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HAROLD O. MOORE, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
MARTHA TACKETT, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
DWIGHT SHELTON, Superintendent, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
ROBERT HILL, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
PARKER BELL, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
DONALD STREET, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
TRUDY BYARD, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
CHRISTINE RATCLIFF, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
JERRY STONE, Superintendent, Iuka Special Municipal Separate School District, Iuka, Mississippi;
C. NEIL DAVIS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
CHARLES LEWIS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
NEIL SCHILLINGS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
FRANK JIMMAR, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;

STANLEY DEXTER, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
JIMMY LYNN NELSON, Superintendent of Public Education, Lafayette County School District, Oxford, Mississippi;
EARL BABB, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES E. HAMILTON, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES C. STONE, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
WILLIAM BUFORD, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
C.W. WHITE, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES R. BRYSON, Superintendent, New Albany Municipal Separate School District, New Albany, Mississippi;
BOBBY GAULT, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
BEN KITCHENS, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
DAVID HOLMES, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
DR. DAVID ELLIS, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
MALCOLM HICKEY, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
HOSEA A. GRISHAM, Superintendent, North Panola Consolidated School District, Sardis, Mississippi;
DEMSEY COX, Trustee, North Panola Consolidated School District, Sardis, Mississippi;

CHARLES BLAKELY, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
TAYLOR JEFF McLEOD, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
REID P. DORR, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
POLLY GORDON, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
BILLY D. STROUPE, Superintendent, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
TATE RUTHERFORD, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
FRANCIS HOPPER, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
JOE McMILLAN, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
BILLY H. AYERS, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
J.W. McMILLAN, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
DR. BOB McCORD, Superintendent, Oxford Municipal Separate School District, Oxford, Mississippi;
LEONARD E. THOMPSON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
REBECCA L. MORETON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
RONALD F. BORNE, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
DOROTHY B. HENDERSON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;

W.N. LOVELADY, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
JOE B. HARTLEY, Superintendent of Public Education, Panola County School District, Batesville, Mississippi;
WILLIAM STILL TAYLOR, Member, Board of Education, Panola County School District, Batesville, Mississippi;
ANN WHITTEN BRAME, Member, Board of Education, Panola County School District, Batesville, Mississippi;
TRAVIS D. MURPHREE, Member, Board of Education, Panola County School District, Batesville, Mississippi;
CECIL WARDLAW, Member, Board of Education, Panola County School District, Batesville, Mississippi;
HARRY O'NEILL, Member, Board of Education, Panola County School District, Batesville, Mississippi;
BILLY CURBOW, Superintendent, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
BUDDY MONTGOMERY, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
LARRY YOUNG, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
THOMAS CHEWE, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
RAY LEEPER, JR., Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
JEAN MAPP, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
JAY W. GREENE, Superintendent of Public Education, Prentiss County School District, Booneville, Mississippi;
EDWIN BROWN, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;

LARRY JOE CROSBY, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
CLIFTON RUMMAGE, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
BILLY WIMBERLEY, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
HAROLD WOODRUFF, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
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MILLS CARTER, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
W.R. PERKINS, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
JAMES JACKSON, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
MAURICE BATEMON, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
DAVID C. COLE, Superintendent, South Panola Consolidated School District, Senatobia, Mississippi;
BRYANT WOODRUFF, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
O.T. MARSHALL, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
J.H. MOORE, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
ALTON MILAM, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
LEONARD MORRIS, Trustee, South Panola Consolidated School District, Batesville, Mississippi;

JACK HARRIS, Superintendent, South Tippah Consolidated School District, Ripley, Mississippi;
CLARENCE STANFORD, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
EDWARD BURGE, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
T.C. MAUNEY, JR., Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
J.C. NEWBY, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
H.L. HELLUMS, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
DONALD MERRITT CLANTON, Superintendent Of Public Education, Tate County School District, Senatobia, Mississippi;
BYRON DURLEY, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
ROBERT BARRY EMBREY, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
STEVE BENTON LENTZ, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
HUEL STANLEY BLAIR, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
SAMMY BENFORD ASHE, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
DR. JULIAN PRINCE, Superintendent, Tupelo Municipal Separate School District, Tupelo, Mississippi;
AARON MORGAN, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
JIMMY FLOYD, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;

MRS. DOYCE REAS, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
CHARLIE GREEN, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
STEVE NORWOOD, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
SAMMY S. DOWDY, Superintendent of Public Education, Union County School District, New Albany, Mississippi;
L.H. PARNELL, Member, Board of Education, Union County School District, New Albany, Mississippi;
CLEO FOOSHEE, Member, Board of Education, Union County School District, New Albany, Mississippi;
GARLAND GRAY, Member, Board of Education, Union County School District, New Albany, Mississippi;
IRA KUYKENDALL, Member, Board of Education, Union County School District, New Albany, Mississippi;
PALMER SMITH, Member, Board of Education, Union County School District, New Albany, Mississippi;
ALFRED S. REED, JR., Superintendent, Water Valley Line Consolidated School District, Water Valley, Mississippi;
FRANK B. BROOKS, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
LILLY B. HORAN, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
DANNY ROSS INGRAM, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
BENNIE COLE TAYLOR, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
JOHN EDDIE ROGERS, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;

TOM LOTT, Superintendent, West Point Municipal Separate School District, West Point, Mississippi;
ROBERT L. CALVERT, III, Trustee, West Point Municipal Separate School District, West Point, Mississippi;
PETER THOMAS HODO, JR., Trustee, West Point Municipal Separate School District, West Point, Mississippi;
JOHN H. PARKER, SR., Trustee, West Point Municipal Separate School District, West Point, Mississippi;
WILLIAM LESLIE CHRISTIAN, Trustee, West Point Municipal Separate School District, West Point, Mississippi;
CORNELIA WALKER, Trustee, West Point Municipal Separate School District, West Point, Mississippi;

LASONDRA ADDISON, a minor, by and through her mother and next friend, Linda Addison;
CHARLES RAY ALLEN, II, a minor, by and through his father and next friend, Charles Ray Allen;
NANCY ELIZABETH BEEBE, a minor, by and through her father and next friend, Robert John Beebe;
PHYLLIS CAROL BELL, a minor, by and through her father and next friend, Wallace L. Bell;
KERRY MILLS BRYSON, a minor, by and through his father and next friend, James R. Bryson;
JONATHAN ANDREW BUNCH, a minor, by and through his father and next friend, Austin W. Bunch;
MELISSA ANNE CLEMMONS, a minor, by and through her father and next friend, John Edgar Clemmons, Jr.;
CARL RICKEY COLEMAN, a minor, by and through his father and next friend, Albert Coleman;
DEE ANN COX, a minor, by and through her father and next friend, Bobby Joe Cox;
VICKI DENISE GANN, a minor, by and through her father and next friend, O. Wayne Gann;

GALEN VINCENT HENDERSON, a minor, by and through his father and next friend, G.W. Henderson, Jr.;
SHERRY RENAE HOGUE, a minor, by and through her father and next friend, Charles Archer Hogue;
YOLANDA JACKSON, a minor, by and through her mother and next friend, Sarah A. Jackson;
FLORENCE DENISE JONES, a minor, by and through her father and next friend, Cleveland Hoover Jones;
AMY J. LIVINGSTON, a minor, by and through her father and next friend, Stephen Price Livingston, Sr.;
MINNIE LUCILLE LONG, a minor, by and through her father and next friend, John Henry Long;
UNSELD MASON, a minor, by and through his mother and next friend, Shirley Mason;
PRELNA RENEE McNEIL, a minor, by and through her mother and next friend, Juanita W. McNeil;
CHRISTOPHER DOUGLAS PRUETT, a minor, by and through his father and next friend, Kenneth Douglas Pruett;
SCOTTY GLEN PURDEN, a minor, by and through his grandmother, guardian and next friend, Grace Purden;
SAMMY CLARK RICHEY, a minor, by and through his father and next friend, Samuel Larry Richey;
RYAN K. ROBINSON, a minor, by and through his mother and next friend, Mary K. Robinson;
THOMAS JASON RUSSELL, a minor, by and through his father and next friend, Jimmy Darrell Russell;
MICHAEL EDWARD SMITH, a minor, by and through his father and next friend, Ralph Edward Smith;
SHARLENE ANN STOREY, a minor, by and through her father and next friend, Thomas B. Storey;
WALTER LEE WELCH, a minor, by and through his mother and next friend, Francis Onell Welch;

JAMES MIKE WORTHAM, a minor, by and through his mother and next friend, Inell Corbitt Wortham;
DANIEL GRIFFIN WREN, a minor, by and through his father and next friend, Tommy Wayne Wren.

Respondents:

WILLIAM A. ALLAIN, Governor, State of Mississippi;
RICHARD MOLPUS, Secretary of State and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
RICHARD A. BOYD, Superintendent of Education and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
EDWIN LLOYD PITTMAN, Attorney General and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
CONNIE SLAUGHTER-HARVEY, Assistant Secretary of State, State of Mississippi

The original federal defendants have, by joint stipulation, been dismised from this lawsuit. The federal defendants no longer have an interest in this case and are not parties to the petitioning of this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Constitutions and Statutes:

NO. 85-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

B.H. PAPASAN, Superintendent
of Education, et al.
Petitioners

versus

William A. ALLAIN, Governor,
State of Mississippi, et al.
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit regarding the panel decision dated April 5, 1985 and the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc dated May 21, 1985.

OPINIONS BELOW

Court of Appeals: The panel decision of the Court of Appeals for the Fifth Circuit, dated April 5, 1985, is reported as Papasan v. United States, 756 F.2d 1087 (1985) (Appendix (2) at A-3). The Order denying rehearing or rehearing en banc was issued on May 21, 1985 (Appendix (1) at A-1).

District Court: The Order dismissing with prejudice is unpublished (Appendix (3) at A-37).

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was delivered on April 5, 1985. A timely petition for panel rehearing and a suggestion for rehearing en banc was denied May 21, 1985. Application was made to Justice White for an extension of time wherein to file this petition and such application was granted on August 6, 1985, ordering an extension until September 18, 1985. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1948).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I § 10

> "No State shall...pass any...Law impairing the Obligation of Contract..."

U.S. Const. amend. XIV, § 1

> "....No state shall...deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 (1979)

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects or causes to be subjected, any citizen...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

There is a line drawn across the State of Mississippi that divides its schoolchildren into two classes. To one class--the children of twenty-three "Chickasaw Cession" counties in North Mississippi--the State has chosen to deny the funds necessary for a minimally adequate education. To the other class--the children of the fifty-nine southern Mississippi counties--the State arbitrarily allows the benefit of the entire income from the federally-created school lands trust. The school lands trust fund, a critical element of school funding in Mississippi, provides schools in the counties south of the line $31.25 per pupil each year. For the Chickasaw Cession counties, Mississippi officials, in lieu of school land trust income, appropriate 80¢ per pupil each

year.[1] This difference in benefit is not an accidental by-product of a system of administration of local lands by local schools, but is rather a result of an irrational discrimination by state officials against the schoolchildren of North Mississippi.

The long history of congressional action designed to impose upon the states a binding perpetual trust obligation to use certain segments of granted lands, as well as any revenue generated from their sale or lease, for the support of public schools is well documented. See Andrus v. Utah, 446 U.S. 500, 523-528 (1980)(Powell, J. dissenting). This case presents a gross abuse of that obligation by the officials of the State of Mississippi. In the Chickasaw Cession counties, Mississippi officials, without the prior authority of the federal settlor, sold the lieu lands that constituted the corpus of the federally-created[2] trust for a grossly inadequate price, then lost the proceeds by investing them in fixed-interest "loans" to railroad companies that failed. After these railroads failed, ignoring its duty to treat all trust beneficiaries equally, state officials substituted a fixed payment for the lost income from the trust.

Each county outside the Chickasaw Cession maintains control over the school trust lands located in those counties. State officials have delegated management to each such county locally and allowed local use of the entire income from the trust.

These facts were asserted in the complaint filed on June 12, 1981 on behalf of the schoolchildren in the United States

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1 Lead plaintiff "B.H. Papasan" is the Superintendent of Education for Tunica County, Mississippi. Latest census figures show that, with the exception of a leper colony in Hawaii on Molokai, Tunica is the poorest county in the nation.

2 The original federal defendants have, by joint stipulation, been dismissed from this lawsuit. The federal defendants no longer have an interest in this case and are not parties to the petitioning of this Court.

District Court for the Northern District of Mississippi. The complaint raised equal protection and federal trust claims (U.S. Const. amend. XIV, § 1; 42 U.S.C. 1983 (1979)). The complaint also raised a contracts clause claim, based on the state's violations of its contractual obligations as trustees of the school lands trust (U.S. Const. art. I, § 10). The complaint sought prospective, injunctive relief from the state officials responsible for the school lands trust.

The schoolchildren's attempts to obtain discovery and class certification were held in abeyance. Three-and-a-half months after the complaint was filed, the state Defendants--who have never answered the complaint--filed a motion to dismiss.[3] While affirmative defenses were raised, the sufficiency of the equal protection, federal

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[3] Given the procedural posture of this case, all assertions by the schoolchildren as to the manner, and degree, of their deprivation must be accepted as true.

trust, and contract clause claims was not questioned.

Circuit Judge J.P. Coleman, sitting by special designation as a district judge,heard the motion to dismiss sixteen months after it was filed. He held the motion under advisement for eleven months, and dismissed the complaint without an opinion, holding that all claims--including those for prospective, injunctive relief--were barred by the eleventh amendment or the statute of limitations. On appeal, the Fifth Circuit not only held that the eleventh amendment barred the federal trust claim, but also addressed and rejected the equal protection claim on its merits--though the merits of this claim had never been briefed or argued.

REASONS FOR GRANTING THE WRIT

FIRST QUESTION

MAY SCHOOLCHILDREN BE AFFORDED PROSPECTIVE INJUNCTIVE RELIEF TO REMEDY CURRENT CONDITIONS RESULTING FROM A BREACH BY STATE OFFICIALS OF THE FEDERAL SCHOOL LANDS TRUST?

A. This Case Poses A Significant Unsettled Question As To How A Trust, Created By The Federal Government and Managed By A State As Trustee, Is To Be Judicially Enforced

This case raises issues concerning the obligations imposed upon the various states as trustees for the sixteenth-section lands trusts. Between 1803 and 1962, the United States funded the school lands trust with some 78,000,000 acres of trust land. Lassen v. Arizona, 385 U.S. 458, 460 n.3 (1967). The trusts are held by the various states as trustee for the benefit of the school children in those states. An unresolved federal question of great importance is presented concerning the nature of the state's obligations as

trustee and the state's duties to cure breaches of those obligations.

The trusts originated in the federal land sales acts; the trusts were a result of contracts between the various states and the federal government. See Andrus v. Utah, 446 U.S. 500, 507 (1980)("school land grant was a 'solemn agreement' which in some ways may be analogized to a contract between private parties."); Cooper v. Roberts, 59 U.S. (18 How.) 339, 341 (1855) (characterized school land grant to Michigan as "compact" between Michigan and United States). In roughly two-thirds of the State of Mississippi, the State has retained the school lands and delegated

management locally.[1] But in the Chickasaw Cession, the State mandated the sale of all lieu lands for six dollars per acre.[2] This sale at an inadeqate price produced an undervalued corpus. The State then mandated that the funds from the sale be invested in specific railroad companies at a specific interest rate.[3] The State then lost its entire investment when the railroads failed.

After losing the small amount it had produced from the sale, the State set an arbitrary interest rate it would pay on the

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1 Miss. Code Ann. §§ 29-3-1 et seq. (1972) (providing an elaborate system under which school boards manage the land "under supervision of the state land commissioner...."); see Washington County v. Riverside Drainage District, 159 Miss. 102, 108, 131 So. 644, 645 (1931) ("...sixteenth section land is owned by the state, and...the various counties are simply the state's agents for administering the school trust....").

2 1848 Miss. Laws ch. III, at 62.

3 1856 Miss. Laws ch. LVI, at 141.

undervalued corpus it had lost.[4] Since taking the Chickasaw Cession's share of the trust, the State has made no effort to cure the effects of its misfeasance, either by redistribution of the corpus remaining in the balance of the state, or by other remedy that would assure the Chickasaw Cession school children of the funding they would have had if the mismanagement had not occurred. It is the state's present and continuing failure to so cure the effect of its misfeasance that forms the basis of the school lands trust claim. The school children sought prospective, injunctive

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4 Miss. Const. art. VIII, § 212 (1890).

relief.[5] The relief sought would either assure the school children of benefits from what remains of the trust lands in the rest of the state, or would provide the school children some reasonable equivalent.

This Court's most recent cases analyzing the trust, Andrus v. Utah and Lassen, provide little guidance in answering the questions presented concerning the duties of the trustee. Andrus v. Utah involved the narrow question of whether the Secretary of Interior had the authority to disapprove specific selections of lieu or indemnity lands made by the state. Andrus v. Utah, 446 U.S. at 520. In Lassen, this Court held that the specific terms of the statute creating the trust in Arizona required that the trust be compensated at fair market value for land taken for highways. Lassen, 385 U.S. at 469. Neither case resolves the important questions concerning trust managment presented in the case at bar.

Before these cases, the school lands trust had last been before this Court in Alabama v. Schmidt, 232 U.S. 168 (1914), which stated that the trust is "honorary" and unenforceable. 232 U.S. at 174. The state was thus held to have complete power to do whatever it wanted with the land, including lose it completely. This holding has obviously been overruled by Lassen, which required that the state could not divert school lands to other uses without compensating the trust for the full market

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5 The Fifth Circuit held that the federal trust claims necessarily involved retroactive relief because the claims originate in past misconduct. The Fifth Circuit so held despite the fact that the school children sought prospective, injunctive relief from the future injuries that will be sustained as a result of the state defendants' misconduct. The Fifth Circuit also ignored the allegations in the complaint of continuing state misfeasance in failing to equitably distribute the income from what remains of the trust. Papasan v. United States, 756 F.2d 1087, 1093-94 (1985).

value of the lands diverted.[6] In sum, the most recent cases concerning the trust--Andrus v. Utah and Lassen-- provide insufficient guidance as to how the trust may be enforced, and the only other case providing such guidance--Alabama v. Schmidt--is no longer good law.

How and to what degree past breaches of federally-imposed trusts may be remedied has been and remains the subject of this Court's current attention. Depending on the character of the trust, and the identity of the breaching party, this Court has reached widely varying results. For example, in Summa Corporation v. California ex rel. State Lands Commission, _____ U.S. ____, 80 L.Ed.2d 237 (1984), California, as trustee, breached the public

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6 Lassen, 385 U.S. at 469; see United States v. 111.2 Acres of Land in Ferry County, Washington, 293 F.Supp. 1042, 1049 (E.D. Wash. 1968) affirmed 435 F.2d 561 (9th Cir. 1970)("intimations" in Alabama v. Schmidt that trust is illusory "dispelled" by Lassen v. Arizona, 385 U.S. 458 (1967)).

tidelands trust when it failed to intervene in the 1852-73 patenting procedure. This Court held that the state had lost title because it had failed to assert its rights. 80 L.Ed.2d at 242-43, 246. Summa held the trustee was estopped by its failure to act; there was no issue raised as to the trustee's duty to make the beneficiary whole for the trustee's misfeasance. By contrast, in County of Oneida, New York v. Oneida Indian Nation, _____ U.S. _____, 84 L.Ed.2d 169 (1985), this Court held that purchases of Indian trust lands by New York in 1795--which violated the federal Indian lands trust--provided the basis for a federal common law remedy to restore the corpus of the trust to the Oneida Indians. 84 L.Ed.2d at 180.

There are several distinctive features of the trust in Oneida that are isomorphic with features of the trust in the instant case: (1) the agreements creating and securing the trust "did not establish a comprehensive remedial plan for dealing

with violations..." 84 L.Ed.2d at 181; (2) ratification of trust violations was attempted through subsequent acts of Congress, 84 L.Ed.2d at 186-87; and (3) the agreements and statutes underlying the trust contains clauses "voiding" land sales that are not made in compliance with the trust. 84 L.Ed.2d at 186. These isomorphisms between Oneida and the instant case appear to indicate that the school lands trust should be judicially enforced similarly to the Indian land trust. The Fifth Circuit, however, ignored Oneida[7] and without the aid of applicable precedent, and without any attempt to analyze the nature of the trust obligations, denied the schoolchildren's federal trust claim. This underscores the thoroughly unsettled nature of this significant federal question as to how

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[7] Despite extensive briefing on Oneida, the Fifth Circuit failed to even mention the case in its opinion.

federal school lands trusts may be judicially enforced.

B. This Case Poses A Significant Unsettled Question As To Whether A State's Breach Of Obligations As Trustee Of a Federal Trust Violates The Contracts Clause

The statutes creating the school lands trust create obligations that are contractual in nature. See Andrus v. Utah, 446 U.S. at 507 ("school land grant was 'a solemn agreement'"). Justice Powell made a similar point in his dissent:

> As consideration for each new State's pledge not to tax federal lands, Congress granted the State a fixed proportion of the lands within its borders for the support of public education. [citations omitted]
>
> These agreements were solemn bilateral compacts between each State and the Federal Government. [citations omitted] For its part, the Government granted the State specific sections of land within each township laid out by federal survey.
>
> -Andrus, 446 U.S. at 523 (Powell, J. dissenting)

Any breach by the state of its duties as trustee is simultaneously a breach of these contractual obligations.

This court has recently held that a state's repudiations of its contract obligations can violate the contract clause. United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 24-28 (1977). This Court's cases, however, provide no guidance as to whether the contract clause is violated when the State commits a breach that does not amount to a repudiation of the contract duty. Furthermore, this Court's cases provide no guidance as to the limitations the contract clause places on a state's ability to ignore duties imposed by federal contracts creating trusts. These questions are of great importance both with regard to the school lands trust and with regard to other federally-created trusts.

SECOND QUESTION

CAN A DISCRIMINATORY DENIAL OF A MINIMALLY ADEQUATE FREE PUBLIC EDUCATION TO SOME CHILDREN CONSTITUTE A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. This Case Poses A Significant Federal Question Concerning Whether Schoolchildren Who Are Discriminatorily Denied A Minimally Adequate Free Public Education May Be Entitled To Prospective Relief Under The Equal Protection Clause

This Court has made two principles clear: (1) a discriminatory absolute deprivation of educational opportunity will invoke intermediate scrutiny under the equal protection clause, Plyler v. Doe, 457 U.S. 202, 230 (1982); and (2) a mere inequality in funding among school districts where schcolchildren in all districts receive an adequate education will not invoke intermediate scrutiny under the equal protection clause, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 24 (1973). There is a gap--a "twilight zone" if you will--between Plyler

and Rodriguez into which fall cases concerning schoolchildren who are not deprived absolutely of educational opportunity, but are deprived nonetheless of a minimally adequate education. This case, falling within that gap, presents the question whether a discriminatory non-absolute denial of a "minimally adequate" education would invoke intermediate scrutiny.

Discussions in Rodriguez and Plyler seem to indicate that discriminatory denial of a minimally adequate education would suffice to invoke intermediate scrutiny, under the equal protection clause

> "...some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."
>
> -Plyler, 457 U.S. at 221 (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).
>
> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [voting or free speech rights], we have no indication that the present levels of educational expenditure in Texas provide an education that falls short.
>
> -Rodriguez, 411 U.S. at 36-37; see also 411 U.S. at 24-25 (Texas has made the guarantee of an "acceptable education"a primary function, and there is no proof refuting the state contention that it provides "an adequate education").

This language seems to imply the intermediate scrutiny is appropriate for less-than-absolute denials of a minimally adequate education. These implications were not followed by the Fifth Circuit, which construed Rodriguez and Plyler to require an absolute deprivation for intermediate review. 756 F.2d at 1095.

While the Fifth Circuit seemed certain about what Plyler and Rodriguez meant, other circuits have recognized that there is uncertainty as to how Plyler is to be interpreted.

> What is needed to invoke that standard [Plyler's intermediate scrutiny] is unclear....
>
> -United States v. Cohen, 733 F.2d 128, 136 (D.C. Cir. 1984).

> Plyler does not fit clearly into previous structures of equal protection analysis.
>
> -Gwin Area Community Schools v. State of Michigan 741 F.2d 840, 845 (6th Cir. 1984).

Resolution of the issue presented in this case--what it takes to warrant intermediate review in an education context--will remove this uncertainty.

B. There Exists Conflict Between The Fifth Circuit and the Second, Seventh and Ninth Circuits Regarding The Proper Method of Analysis To Be Used For Rational Basis Review

Even if it is determined that low scrutiny is the proper level for evaluating non-absolute discriminatory deprivations of minimally adequate education, still a rational basis must be found for such a deprivation if it is to pass muster.

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike.

> [....]
>
> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.
>
> -Cleburne v. Cleburne Living Center, _____ U.S. _____, 87 L.Ed.2d 313, 320 (1985).

Though holding that a rational basis existed for Mississippi's discriminatory system, the Fifth Circuit's opinion was devoid of the type of analysis this Court has recently performed in its low scrutiny evaluations. This Court has recently applied minimum scrutiny to strike down statutes with residency requirements that were either durational or tied to a fixed date prior to the legislation. Williams v. Vermont, _____ U.S.___, 86 L.Ed.2d 11 (1985); Hooper v. Bernalillo County Assessor, ____U.S. ____, 86 L.Ed.2d 487 (1985); Zobel v. Williams, 457 U.S. 55 (1982). Each opinion involved a detailed analysis of possible rationales for the

legislation, and a detailed discussion of the presence of, or lack of, logical fit between the purported reasons and the statutes at issue. The Second Circuit has explicitly followed the Zobel mode of analysis in a case involving residency issues. See Soto-Lopez v. New York City Civil Service Commission, 755 F.2d 266 (272-77 (2d Cir. 1985)(Zobel followed in detailed minimum scrutiny analysis striking down law disadvantaging state civil service applicants who had entered m litary service while residing in another state).

Outside the Fifth Circuit, Zobel has been seen to require a detailed analysis of rationale and purpose as a standard part of minimum scrutiny. In cases that did not involve Zobel-type residency issues, the Seventh and Ninth Circuits explicitly applied the mode of analysis used in Zobel. See Evan v. City of Chicago, 689 F.2d 1286, 1299-1300 (7th Cir. 1982) (Zobel followed in detailed minimum scrutiny analysis striking down statute mandating state tort

claims under $1,000 be paid before those over $1,000); Park v. Watson, 716 F.2d 646, 654-55 (9th Cir. 1983)(Zobel followed in detailed minimum scrutiny analysis striking down distinctions drawn by city in responding to requests to vacate platted streets). This Court, in striking down the zoning ordinance in Cleburne v. Cleburne Living Center, ____ U.S. ____, 87 L.Ed.2d 313 (1985), undertook a detailed Zobel-type examination as part of the standard rational basis review. 87 L.Ed.2d at 325-26.

In the instant case, the minimum scrutiny analysis applied by the Fifth Circuit is completely unlike that applied by this Court or the Second, Seventh, and Ninth Circuits:

> [A] funding difference is not a denial of equal protection unless it lacks a rational basis. San Antonio Independent School District v. Rodriguez, 411 U..S 1, 98 S.Ct. 1278, 36 L.Ed.2d 16 (1973). That rationality is found in the state's structure of school finances. With land values as a base and desired local administration of local

schools,income differences are inevitable.

-Papasan, 756 F.2d at 1095.

This analysis does not take as its touchstone the underlying purpose of a school finance structure--maintenance and support for education. Instead, without any inquiry or analysis to undergird it,[8] the Fifth Circuit's holding simply assumes that Mississippi's school financing structure is rationally-related to the support of education, despite the fact that such rationality is precisely the notion challenged in this lawsuit. The Fifth Circuit fails to examine whether there is any logical connection between the purpose of furthering education (or any permissible purpose) and a decision by the state officials to divest the Chickasaw Cession schools of their sixteenth-section lands,[9] the effect of which is to deny the children of the Chickasaw Cession a minimally adequate education.

The Fifth Circuit applied a method of rational basis review completely different from that announced by this Court and applied by the Second, Seventh, and Ninth Circuits. There is thus a conflict among the circuit courts of appeal as to the

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8 This total lack of analysis is necessarily the case because there is literally no evidence upon which to base any finding regarding the rationality of the school financing structure. Given the procedural posture of this case, the only "evidence" before the Fifth Circuit was the Complaint and exhibits filed by the plaintiff schoolchildren--and these documents clearly show that state officials misfeasance of the school lands trust cannot be rationally-related to providing education. As a matter of law, only after a full trial on the merits, after each side has offered its proof of the rationality or irrationality of the school financing sytem, can a trier of fact make a rational-relation determination. As in San Antonio Independent School District v. Rodriquez, where no summary dismisal was allowed, the school chidren in this case should have been allowed a chance to prove their claim. The finding by the Fifth Circuit, despite an absence of supporting evidence, underlines the specious nature of the rational basis finding.

9 Despite our reliance on Zobel when briefing the lower court, the Fifth Circuit failed to mention the case in its opinion.

proper mode of analysis for rational basis review. Guidance from this Court on this issue is needed.

WHEREFORE, in view of the aforesaid reasons, petitioners respectfully urge this Court to grant the writ to review the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T.H. FREELAND, III, counsel of record for petitioners, hereby certify that I have this day mailed, postage prepaid, three true and correct copies of the above and foregoing Petition for Writ of Certiorari to the following, to-wit:

R. Lloyd Arnold, Esquire
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205

This, the 16 day of September, 1985.

T.H. FREELAND, III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-4109

B.H. PAPASAN, Superintendent
of Education, et al.
Plaintiffs-Appellants

versus

UNITED STATES OF AMERICA, et al.
Defendants

THE STATE OF MISSISSIPPI, et al.
Defendants-Appellees

Appeal from the
United States District Court
for the Northern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC

(Opinion April 5, 5 Cir., 1985, F.2d)

(May 21, 1985)

Before THORNBERRY, REAVLEY & HIGGINBOTHOM,
Circuit Judges

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the

Court be polled on rehearing en banc (Federal Rules of appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

's/ P.E. HIGGINBOTHAM
United States Circuit Judge

B.H. PAPASAN, Superintendent of Education, et al., Plaintiffs-Appellants

v.

UNITED STATES of America, et al. Defendants-Appellees.

No. 84-4109.

United States Court of Appeals
Fifth Circuit

April 5, 1985.

Before THORNBERRY, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

A number of county school boards, superintendents of education, and individual schoolchildren in twenty-three Northern Mississippi counties attacked the administration of Mississippi's school lands trust in a suit against federal and state officials. The district court dismissed the complaint against the state defendants on limitations and Eleventh Amendment grounds and the claims against the federal defendants have since been

abandoned. Finding all claims either insufficient under the Fourteenth Amendment or barred by the Eleventh Amendment, we affirm.

I

-1-

In its western expansion, the United States encouraged public education by granting school lands to newly-admitted states.[1] The Land Ordinance of 1785, which provided for the survey and sale of the Northwest Territory,[2] thus "reserved the lot No. 16, of every township, for the maintenance of public schools within the said township..." 1

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1 See Andrus v. Utah, 446 U.S. 500, 22-28, 100 S.Ct. 1803, 1814-17, 64 L.Ed.2d 458 (1980)(Powell, J., dissenting) for a historical overview of school land grants in this country.

2 The Northwest Territory included all of the land west of the original thirteen states, north of the Ohio River, east of the Mississippi River and south of Canada. Public Land Law Review Commission, History of Public Law Development, Ch. 1-3 (1968).

Laws of the United States 565 (1815).[3] Though title to Sixteenth Section land vested in the state upon approval of the federal survey, the state had a "binding and perpetual obligation to use the granted lands for the support of public education." Andrus v. Utah, 446 U.S. 500, 523, 100 S.Ct. 1803, 1815, 64 L.Ed.2d 458 (1980)(Powell, J., dissenting). All proceeds from the sale or lease of such land were thus "impressed with a trust in favor of the public schools." Id. at 523-24, 100 S.Ct. at 1815. Hence the term, "school lands trust."

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3 The Northwest Territory and all territory acquired thereafter was divided by survey into townships of thirty-six numbered sections, each one square mile in area. "Sixteenth Section" land thus refers to section number sixteen, reserved in each township for public schools. The Northwest Ordinance of 1789, which provided for the government of the Northwest Territory, 1 Stat. 50, echoed the policy behind this reservation declaring: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52.

A similar history attends the land south ofthe Ohio River. Under its charter from England, Georgia held claim to most of what now comprises the states of Georgia, Alabama and Mississippi. In 1802, Georgia ceded these territories to the United States, on the condition that they would eventually attain statehood with the same privileges and rights granted the inhabitants of the Northwest Territory under the Northwest Ordinance of 1789.[4] In 1803, Congress provided for the survey and disposition of all lands south of the state of Tennessee to which Indian title had been extinguished. 2 Stat. 229 (1803).

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4 See Articles of Cession and Agreement, April 24, 1802, V Territorial Papers of the United States, 142 (1802)· 802 Laws of Georgia, No. 35, art. 1, 5th Condition.

Earlier, in 1789, Congress estabished the Mississippi Territory, comprising what is now the southern two-thirds of Mississippi and Alabama, and provided that it be governed by the provisions of the Northwest Ordinance of 1789. 1 Stat. 549, 550, § 6 (1798). The Mississippi Terriory was extended in 1804. 2 Stat. 303, § 7 (1804)

As with the Northwest Territory, Sixteenth Sections were reserved, 2 Stat. 229, Ch. 27, § 12 at 234 (1803) and their lease authorized, 3 Stat. 163 (1815), for the support of the public schools within each township.[5] In 1817, Congress authorized the formation of the State of Mississippi, 3 Stat. 348 (1817), the survey of its lands, and the reservation of Sixteenth Sections. 3 Stat. 375 (1817). "Title" to certain land in Northern Mississippi, however, remained in the Chickasaw Indian Nation.[6] These Indian claims were not extinguished until 1832,

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5
Because some of this Sixteenth Section land was subject to the prior claims of settlers and grantees, Congress authorized the Secretary of the Treasury to select substitute school lands in lieu of unavailable reserved sections. 2 Stat. 400, 401, § 6 (1806).

6
Apparently there was dispute in the court below as to whether any of the pre-1832 Acts of Congress reserving Sixteenth Section land for public schools applied to the Chickasaw Indian land. We need not face these issues here.

when, pursuant to the Treaty of Pontotoc Creek, the Chickasaw Indians ceded all of their lands east of the Mississippi River to the United States. 7 Stat. 381 (1832).[7] Under this Treaty, all of the Chickasaw Cession lands were to be surveyed by the United States, and sold to private parties, with the proceeds to the Chickasaw Nation. Unlike other government land sales, however, no Sixteenth Section land was reserved from the sale of the Chickasaw lands. See City of Corinth v. Robertson,

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7
The Chickasaw Cession territory encompassed the twenty-three North Mississippi counties in which the plaintiffs reside. These counties include: Alcorn, Benton, Calhoun, Chickasaw, Clay, Coahoma, DeSoto, Itawamba, Lafayette, Lee, Marshall, Monroe, Panola, Pontotoc, Prentiss, Quitman, Tate, Tippah, Tishomingo, Tunica, Union, Webster and Yalobusha Counties. Of these, Coahoma, Quitman, Webster and Yalobusha are only partly within the Cession.

125 Miss. 31, 87 So. 464 (1921).[8] This case has its genesis in that circumstance.

To remedy this deficiency, Congress in 1836, authorized the selection of other unsold public land in the Chickasaw Cession, equal to and in lieu of the unreserved Sixteenth Sections. Once selected, these lands were to "vest in the State of Mississippi for the use of schools within said territory in said State." 5 Stat. 116, § 2 (1836).[9] After the Mississippi Legislature accepted the

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All of the Chickasaw lands were sold despite the fact that the Treaty provided that the land would be surveyed and sold "in the same manner and on the same terms as other public lands...." Art. II, Treaty of Pontotoc Creek.

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Though Congress originally authorized the Secretary of the Treasury to select lieu lands, it later allowed Mississippi's Governor to direct the selection. 5 Stat. 490 (1842).

Chickasaw Cession Lieu Lands,[10] 1844 Miss.Laws Ch. LXVII at 238, it authorized their ninety-nine-year lease, "renewable forever," at a price not less than six dollars per acre, with the proceeds therefrom "to be held in trust by said state for the use of schools in the Chickasaw Cession." 1848 Miss.Laws Ch. III at 62. In 1852, apparently to clarify Mississippi's authority to lease or sell its lieu land, see Jones v. Madison County, 72 Miss. 777, 794-95, 18 So. 87 (1895), Congress ratified all past leases and authorized the State to sell the lands for the support of the Chickasaw Cession schools. 10 Stat. 6 (1852). The Mississippi Legislature then authorized the fee sale of the Chickasaw Cession Lieu Lands and directed that the sales proceeds be invested in eight percent loans to the

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10
The Chickasaw Cession Lieu Lands comprised some 174,555 acres located in the counties of Bolivar, Coahoma, Tallahatchie, Quitman, Panola and Leake.

State's railroads. 1856 Miss.Laws Ch. LVI. Most of the investment was lost when the railroads were destroyed in the Civil War.

Since then, the Mississippi Legislature has appropriated monies to replace the interest lost on its failed investment, see 1878 Miss.Laws, Ch. IX at 86, first at eight and later at six percent. See Miss. Const. Art. VIII, § 212 (1890) These funds are paid each year to the Chickasaw Cession counties for the support of their public schools in lieu of the returns on the unreserved Sixteenth Section lands or the ill-disposed Lieu Lands. Under this current system, the highest annual receipt from the lieu land appropriation in the Chickasaw Cession in 1980 was $4,586.72 or $.80 per student, as compared to the $69,112.34 or $31.25 per pupil average realized from the school lands trusts in other Mississippi counties.

Plaintiffs and intervenors here include a group of county school boards,

superintendents of education, and individual school children, all residing in the Chickasaw Cession counties in North Mississippi.[11] In June of 1981, these plaintiffs sued certain federal and state officials attacking the difference between the school lands appropriations to the Chickasaw Cession and the monies paid to other schools from trust funds. The state defendants include the State of Mississipi,

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[11] The plaintiffs also sought to bring the action as a class, defined as

> All children residing in the counties within the Chickasaw Cession Territory in Northern Mississippi, who are of school age or who may become of school age (including children not yet in being) and all children residing in said Territory and who may in the future become of school age and all children who at this time are attending or who may in the future attend the public schools in any of said school districts and counties within the Chickasaw Cession Territory.

The district court held the motion for class certification in abeyance pending resolution of the defendants' motions to dismiss.

its Governor, the Secretary and Assistant Secretary of State, the Superintendent of Education, and members of the State Board of Education and the Lieu Land Commission, sued in official and successor capacities.

The complaint chronicled purported "illegalities" dating back to the Northwest Ordinance of 1785. It sought a declaratory judgment that various federal acts and treaties, as well as certain Mississippi enactments, were "unlawful, void, and unenforceable" insofar as they purported to authorize the sale of the Chickasaw Cession Sixteenth Section Lands or Lieu Lands. The complaint also alleged that both the federal and state defendants had breached perpetual and binding obligations of the school lands trust. The claims against the federal defendants were specifically based on breach of promise to fund the Chickasaw Cession trust and failure to prevent the State of Mississipi from wasting trust property. The State defendants allegedly breached their trust duties by improperly

investing the proceeds from the unlawful sale of the Chickasaw Cession Lieu Lands. The complaint also alleged a claim under 42 U.S.C. § 1983, asserting that the Stateviolated both the due process and equal protection guarantees of the Fourteenth Amendment by allotting the Chickasaw Cession counties disproportionate school lands appropriations, thereby depriving their schoolchildren of a "minimally adequate level of education."[12]

The complaint prayed for a wide range of relief, including a "conveyance of...real and/or personal property (including money) of equivalent income producing value" to the Chickasaw Cession Sixteenth Sections and/or Lieu Lands and asked that the defendants "acquire, set

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[12] The complaint also alleged constitutional claims under the contract clauses of the Mississippi and United States Constitutions, the Fifth Amendment's prohibition against taking without just ensation, and the Ninth Amendment.

aside and make available" new lieu lands. Additionally, the plaintiffs sought to "enjoin" and "direct" the defendants to establish "a fund or funds of such value" as was reasonably necessary to provide "hereafter" and "in perpetuity" annual income to the Chickasaw Cession school districts at an "equitable and just" level, equivalent to what the Chickasaw Cession districts would enjoy if the State still owned the unlawfully sold land. The plaintiffs also sought to be "compensate[d] and ma[d]e whole" for the income and interest lost through imprudent trust management from 1832 to the present. Finally, the plaintiffs requested that the defendants take whatever other steps were reasonably necessary to "[e]liminate and compensate and for the future guarantee and protect plaintiffs and the plaintiff class against...denials and deprivations of their rights to due process of law and to the equal protection of the laws," and then to "[d]evelop, prepare and file with the

Court...a plan for the orderly implementation of the declaratory and injunctive relief otherwise granted."

After "accepting as true all factual allegation made by plaintiffs," the district court granted all motions to dismiss. The court held the claims against the federal defendants barred by sovereign immunity, laches, and statutes of limitations. This order dismissing the federal defendants is not before us, as its appeal has been dismissed by joint stipulation. By separate order, the district court also dismissed the action against the state defendants. The court held that all of the state actions complained of were before the expiration of any applicable statute of limitations and that "any monetary remedy [was] barred by the Eleventh Amendment to the United States Constitution." The district court held that under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), it lacked

jurisdiction to entertain any "viable equal protection claim for relief *in futuro*" under the Mississippi Constitution and that any such claim was "likewise barred by the Eleventh Amendment because the only possible relief could come only from a monetary award against the state treasury." Plaintiffs appeal the dismissal of their claims against the state defendants.

II

The state defendants defend the order dismissing them on Eleventh Amendment grounds, urging that the suit was against the State of Mississippi itself over which the federal court lacked jurisdiction; that while state officers were nominally sued in their official capacities, the State was the real party in interest. The argument continues that regardless of how characterized, the requested "dollars or dirt" relief would inevitably expend itself on the public treasury. We agree.

The Eleventh Amendment is a jurisdictional bar to federal court suit by private citizens against a state. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L Ed.2d 662 (1974); *Chiz's Motel & Restaurant, Inc. v. Mississippi State Tax Commission*. 750 F.2d 1305, 1307 (5th Cir. 1985). In the absence of express consent[13] the Eleventh Amendment proscribes suits in federal court against the state and its agencies, regardless of the type of relief sought. *Pennhurst*, 104 S.Ct. at 908. The district court thus correctly dismissed the complaint insofar as it sought relief directly from the State.

The Eleventh Amendment also reaches claims against state officers when they are nominal defendants and the state is "the

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[13] Mississippi has expressly preserved its immunity from suit in federal court. *See* 1984 Miss. Laws ch. 495, § 3(4).

real substantial party in interest." Ford Motor Company v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945). The state is the real party in interest when the relief sought would operate against the sovereign by expending itself on state coffers. Pennhurst, 104 S.Ct. at 908-09; Quern v. Jordan, 440 U.S. 332, 337, 99 S.Ct. 1139, 1143, 59 L.Ed.2d 358 (1979); Edelman, 415 U.S. at 663-64, 94 S.Ct. at 1355-56. Thus, the Eleventh Amendment disables a federal court from awarding retroactive "monetary relief from the state in the form of compensatory damages, punitive damages, or monetary awards in-the nature of equitable restitution...." Clay v. Texas Women's University, 728 F.2d 714, 715 (5th Cir. 1984) (emphasis added). See also Chiz's Motel, 750 F.2d at 1307; Emory v. Texas State Board of Medical Examiners, 748 F.2d 1023, 1025 (5th Cir. 1984); Karpovs v. State of Mississippi, 663 F.2d 640, 643 (5th Cir. 1981).

The complaint here sought monetary relief as comepenation or restitution for past wrongs. It was cast in the language of damages, seeking "[f]irst and foremost...the establishment of a trust fund...or an order for an annual legislative appropriation in an amount necessary to make whole Plaintiffs...." As a means to this end, it prayed for the conveyance of property, "including money," equivalent in value to the lost Sixteenth Section lands or the unlawfully sold lieu lands. It requested that a fund be established "to compensate, reimburse and make restitution to each of said school districts" for all of the income and interest they each would have received "from 1832 until the present" if such lands had been available and subjected to prudent trust management. The complaint also asked that new lieu lands be "acquire[d], set aside and ma[d]e available for the use and benefit of Plaintiffs" and their class. Such relief was retroactive in character

and satisfiable only from the Mississippi treasury.

-3-

Plaintiffs concede that the district court correctly dismissed their suit insofar as it sought retroactive monetary relief. They argue, however, that because they also sought prospective injunctive relief against state officials alleged to have acted unconstitutionally or in violation of federal law, Pennhurst, 104 S.Ct. at 909; Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), it was error to dismiss the suit in its entirety. See ACLU of Mississippi v. Finch, 638 F.2d 1336, 1341 (5th Cir. 1981); Gay Student Services v. Texas A & M University, 612 F.2d 160, 164-65 (5th Cir.), cert. denied, 449 U.S. 1034, 101 S.Ct. 608, 66 L.Ed.2d 495 (1980).

The complaint alleged that the state defendants denied rights secured by the Congress and the Constitution. The first claim is that the United States, in

granting Mississippi the Chickasaw Cession Lieu Lands, imposed a binding and perpetual trust obligation on the State as trustee to administer the lands in support of public education, and that the lieu land mismanagement breached the fiduciary duties assumed when the lieu lands were set aside by the federal government and accepted by the State. See Andrus, 446 U.S. at 507, 100 S.Ct. at 1807 (school lands grant a "solemn agreement"); id. at 523, 100 S.Ct. at 1815 (Powell, J. dissenting) (federal land grant imposes "binding and perpetual obligation" on state); Lassen v. Arizona Highway Department, 385 U.S. 458, 460, 87 S.Ct. 584, 585, 17 L.Ed.2d 515 (1967) ("United States has a continuing interest in the administration of both the lands and the funds which derive from them"). See also United States v. 111.2 Acres of Land in Ferry County, Washington, 293 F.Supp. 1042, 1049 (E.D. Wash. 1968), aff'd, 435 F.2d 561 (9th Cir. 1970). The State replies that the school lands grant was an

absolute gift to the State to deal with as it pleased and creating no federal legal obligation. See Alabama v. Schmidt, 232 U.S. 168, 173-74, 34 S.Ct. 301, 302, 58 L.Ed. 555 (1914); Cooper v. Roberts, 59 U.S. (18 How.) 173, 15 L.Ed. 338 (1855) (public land grant imposes merely "honorary" obligations).

It matters little how we characterize Mississippi's school lands trust obligations. Assuming that a binding federal compact was created and breached over a century ago, the federal courts have no jurisdiction to address the breach, given the nature of the relief sought. To the extent that the defendants' management of the Chickasaw Cession Lieu Lands violated the Mississippi law of trusts, see Tally v. Carter, 318 So. 2d 835, 838 (Miss. 1975)(Sixteenth Section land held in trust by state); Keys v. Carter, 318 So. 2d 862, 864 (Miss. 1974)(rules applicable to trusts and trust property generally apply to school lands); Holmes v. Jones, 318 So. 2d

865, 869 (Miss. 1975)(applying Mississippi fiduciary law to school lands suit), the complaint is likewise proscribed. The Eleventh Amendment deprives a federal court of pendent jurisdiction over state law claims regardless of the type of requested relief. Pennhurst, 104 S.Ct. at 908; Kitchens v. Texas Department of Human Resources, 747 F.2d 985 (5th Cir. 1984).

The complaint also alleged that the failure to provide the Chickasaw Cession school districts with funding equivalent to that received by districts in the rest of the state violated the equal protection clause of the Fourteenth Amendment "by creating a distinction without rational basis or substantial justification." Such unconstitutional action, plaintiffs contend, stripped the state defendants of any official or representative character and thus of any Eleventh Amendment immunity. Ex parte Young, 209 U.S. at 160, 28 S.Ct. at 454; Finch, 638 F.2d at 1340. They argue that in addition to restitution, they

sought to prospectively enjoin the continuing and allegedly unlawful administration by the defendants of Mississipi's school lands appropriations. Such prospective relief, they continue, is constitutionally permissible, even though it may have a costly ancillary effect on the state treasury.

A federal court can enjoin state officials to correct a constitutional deficiency or eliminate an unconstitutional status even though expenditures incident to that order will expend themselves on the public treasury. See Milliken v. Bradley, 433 U.S. 267, 289, 97 S.Ct. 2749, 2761, 53 L.Ed.2d 745 (1977); Edelman, 415 U.S. at 667-68, 94 S.Ct. at 1357-58; Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); Goldberg v. Kelly, 3917 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The fact that a complaint is phrased in declaratory or injunctive terms, however, is not dispositive. A court rust scrutinize the pleadings to determine what

in essence is sought for "the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." Pennhurst, 104 S.Ct. at 909 (emphasis added).

The complaint sought to "enjoin" and "direct" the defendants to provide plaintiffs "hereafter" and "in perpetuity" annual income equivalent to what the Chickasaw Cession schools would enjoy if the lieu lands had not been sold and the proceeds improperly invested. Such relief is the type of equitable restitution condemned in Edelman, 415 U.S. at 668, 94 S.Ct. at 1358. Like the Edelman injunction, the relief sought here "requires the payment of state funds, not as a necessary consequence of compliance in the future with substantive federal-question determination, but as a form of compensation," id., for legal breaches which occurred more than one hundred and fifty years ago. The complaint

particularized no remedy other than ordering the State to convey land or funds. Such relief certainly would have more than an ancillary effect on the state treasury.

But a federal court should not dismiss a constitutional complaint because it "seeks one remedy rather than another plainly appropriate one." Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 65, 99 S.Ct. 383, 387, 58 L.Ed.2d 292 (1978). Giving the complaint the generous reading due, we can postulate a prospective non-compensatory remedy that arguably flanks the Eleventh Amendment. That claim would shift in focus from the past maladministration of the trust to the present difference in income distributions. By necessity, it would rest on elimination of a perceived presently existing unconstitutional status, such as a prison so inadequate as to violate the Eighth

Amendment.[14] But, there is no present unconstitutional status to rectify. "While a meritorious claim will not be rejected for want of a prayer for appropriate relief, a claim lacking substantive merit obviously should be rejected." See Id. at 66, 99 S.Ct. at 387.

The only arguable current unconstitutional status is the difference between the school lands appropriations to the Chickasaw and to the non-Chickasaw Cession counties. While it is claimed that the difference deprived the schoolchildren of their "right" to a minimally adequate level of education, the plaintiffs admit that they have not sustained an absolute deprivation of educational opportunity. Cf. Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). The complaint

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[14] The plaintiffs point to such prison condition cases in support of their argument. See, e.g., Williams v. Edward, 547 F.2d 1206, 1213 (5th Cir. 1977); Nadeau v. Helgemoe, 561 F.2d 411, 419 n.7 (1st Cir. 1977).

is not that the Mississippi Legislature decides each year to grant the children in the southern counties of the state $31.25 per student, while limiting per pupil appropriations to the Chickasaw Cession to $.80. The southern Mississippi counties still derive income from existing Sixteenth Section or Lieu Lands. School lands appropriations vary even among the southern counties, due to differences in the current values of their lands and the relative financial skills of the local trust administrators.[15] Plaintiffs' argument is then by necessity, that their receipt of less school lands money than that received by southern counties reduces the quality of education below that provided children in non-Chickasaw Cession districts. Apart from the fact that there is no necessary

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[15] Miss. Code Ann. § 29-3-1 et seq. (Supp. 1983) designates local boards of education as the managers of the school lands under the general supervision of the state land commissioner.

correspondence between the amount of money spent and the quality of education, such a funding difference is not a denial of equal protection unless it lacks a rational basis. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). That rationality is found in the state's structure of school finances. With land values as a base and desired local administration of local schools, income differences are inevitable.

Part of the income difference here is attributed to the historical fact that there are no school lands in the Chickasaw Cession to be administered. As was earlier recounted, they were sold and the proceeds invested in the Mississippi railroads that were destroyed in the Civil War. Since 1878, the State has attempted to remedy this bad investment by annual appropriations to the Cessions counties of funds equivalent to six percent of the Lieu Land proceeds loaned to the railroads. The State's failure to adjust these

appropriations to keep step with rising inflation over one hundred and fifty years is no violation of equal protection. The State has continued, however, inadequately, to attempt to remedy the consequences of its ill-fated investment. In pursuing this legitimate, remedial goal, the State need not achieve complete success. New Orleans v. Dukes, 427 U.S. 297, 305, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976); Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S.Ct. 461, 565, 99 L.Ed.2d 563 (1955).

When the overlay of the Civil War loss of a revenue source is removed, we are left with an equal protection attack upon Mississippi's financing of public education. We cannot in a material way distinguish this claim fromthat rejected in Rodriguez.

-4-

Plaintiffs advance two other arguments to support their claim that the Eleventh Amendment is inapplicable. The first contend that the school board plaintiffs are arms of the State authorized to enforce

claims belonging to Mississippi as trustee without jurisdictional impediment. They then argue that the policies underlying the school lands trust agreements impliedly override any Eleventh Amendment immunity. Both contentions are without merit.

We do not reach the merit of plaintiffs' first argument because county school districts are not arms of the State. We have held that under applicable state law, the county school systems in Mississippi are primarily local institutions not entitled to Eleventh Amendment protection. Adams v. Rankin County Board of Education, 524 F.2d 929, 929 (5th Cir. 1975), cert. denied, 438 U.S. 904, 98 S.Ct. 3121, 57 L.Ed.2d 1146

(1978).[16] Cf. Jagnandon v. Giles, 538 F.2d 1166, 1174 (5th Cir. 1976), cert. denied, 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1083 (1977)(Mississippi State University is an arm of state). See also Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)("state" does not include political subdivisions, which under Ohio law, encompassed school districts andboards). The county school boards were thus "citizens" within the meaning of the Eleventh Amendment. See County of Monroe v. State of Florida, 678 F.2d 1124, 1130-31 (2d Cir. 1982), cert. denied, 459 U.S. 1104, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983).

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16 Though the question of whether an entity is an arm of the state for Eleventh Amendment purposes is one of federal law, "federal courts must examine the powers, characteristics, and relationships created by state law" to determine if an action is really one against a "state." Hander v. San Jacinto Junior College, 519 F.2d 273, 279-80, clarified, 522 F.2d 204, 205 (5th Cir. 1975)(under Texas law, school districts are independent political corporations distinct from state itself).

The plaintiffs also argue that Mississippi has impliedly waived its constitutional immunity to federal court suit by virtue of the educational and land grant policies underlying the eighteenth century Acts of Congress which created the school lands trusts. Such implied consent, however, requires that a state enter into a federally-regulated sphere where a private cause of action is provided for violation of a federal regulatory statute. Congress must also expressly indicate that the private remedy is applicable to the states. Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). The plaintiffs point to no federally-created private claim regarding Sixteenth Section trusts. Nor is there any indication that Congress has expressly abrogated a state's Eleventh Amendment protection in this area.

III

We agree with the district court that regardless of how the plaintiffs characterized their action, "the only possible relief could [have] come only from a monetary award against the state treasury." Insofar as plaintiffs sought to remedy an asserted unconstitutional status under the Fourteenth Amendment, they stated no claim. The court lacked jurisdiction over their other claims. We do not reach the question of whether the suit was barred by relevant periods of limitation. Dismissal of the complaint is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

B.H. PAPASAN, et al.

Plaintiffs

- vs - CIVIL ACTION NO. DC 81-90-WK-O

UNITED STATES OF AMERICA,
et al.

Defendants

O R D E R

This matter came on to be heard on the Motions to Dismiss filed by the State of Mississippi and other state defendants, including the Governor of the State, the Secretary of State, the members of the state Board of Education, members of the state Lieu Land Commission, the state Superintendent of Education, the state Attorney General, and the Assistant Secretary of State, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and the Court being advised in the premises

and having heard arguments of counel and considered the briefs filed in support thereof and in opposition thereto, holds that said Motions to Dismiss are well taken and should be sustained.

The Court finds that all actions taken by the State of Mississippi and the predecessors in office of the above named defendants prior to the acts of Congress on May 19, 1852, as well as all actions taken by the State of Mississippi and its officers and officials in the investment of the funds derived from the sale of lieu lands are barred by the statute of limitations and any monetary remedy is barred by the Eleventh Amendment to the United States Constitution. Pennhurst v. Halderman [No. 81-2101, decided January 23, 1984, 52 U.S.L.W. 4155]; Edelman v. Jordan, 415 U.S. 651, 39 L.Ed. 662, 94 S.Ct. 1347 (1974); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945); Worchester County Trust Co. v. Riley, 302 U.S. 292, 82 L.Ed. 268,

58 S.Ct. 185 (1937); Florida Dept. of Health v. Florida Nursing Home Association, 450 U.S. 147, 67 L.Ed.2d 132, 101 S.Ct. 1032.

The Court holds that the issue of whether the plaintiffs have a viable equal protection claim for relief in futuro under Section 212 of the Mississippi Constitution of 1890 as a denial of equal protection is beyond the jurisdiction of the Court as set forth in Pennhurst v. Halderman, supra, and likewise barred by the Eleventh Amendment because the only possible relief could come only from a monetary award against the state treasury.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the complaint filed against the State of Mississippi and all named state defendants in this cause is hereby dismised with prejudice.

This is the final order and judgment of the Court in this case.

SO ORDERED, this the 30 day of January, 1984.

/s/ J.P. COLEMAN
UNITED STATES CIRCUIT JUDGE
Sitting by designation as a Judge of the United States District Court for the Northern District of Mississippi

(A)

NO. 85-499

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL.
Petitioners

vs.

WILLIAM A. ALLAIN, GOVERNOR, STATE OF MISSISSIPPI, ET AL.
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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34 pp

QUESTIONS PRESENTED

A.

Should Certiorari be granted to consider a claim seeking damages against the State of Mississippi, various agencies thereof, and elected public officials of the State of Mississippi in their official capacities under the Fourteenth Amendment which is jurisdictionally barred by the Eleventh Amendment to the Constitution of the United States.

B.

Should Certiorari be granted to consider a pendent state law claim seeking damages against the State of Mississippi, various agencies thereof, and elected public officials of the State of Mississippi in their official capacities which is also jurisdictionally barred by the Eleventh Amendment to the Constitution of the United States.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

CONSTITUTION

CODES

OTHER AUTHORITIES

NO. 85-499

IN THE SUPREME COURT OF THE UNITED STATES

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B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL.
Petitioners

vs.

WILLIAM A. ALLAIN, GOVERNOR, STATE OF MISSISSIPPI, ET AL.
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. PREFACE

Respondents respectfully pray that petitioners' prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit dated April 5, 1985, and the denial of their Petition for Rehearing and Suggestion of Rehearing En Banc dated May 21, 1985, be denied.

II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is dated April 5, 1985, and is reported as Papasan, et al. v. United States, 756 F.2d 1087 (1985). The order denying petitioners' Petition for Rehearing and Rehearing En Banc is dated May 21, 1985.

The District Court's order dismissing petitioners' complaint is dated January 30, 1984, and is unpublished.

III. JURISDICTION

Petitioners seek to invoke jurisdiction by way of a Petition for Writ of Certiorari under the authority of 28 U.S.C. § 1254(1). Respondents submit, however, that this matter presents no substantial federal question.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those identified by petitioners, respondents submit that the following should also be considered by the Court:

United States Constitution,
Amendment XI

V. STATEMENT OF THE CASE

Petitioners filed their complaint on June 12, 1981, in the United States District Court for the Northern District of Mississippi naming therein as state defendants[1]: "The State of Mississippi; William F. Winter, Governor, State of Mississippi[2]; Edwin Lloyd Pittman, Secretary of State, member of the Board of Education, and member of the Lieu Land Commission, State of Mississippi[3]; Charles E. Holladay, Superintendent of Education, member of the Board of Education, and member of the Lieu Land

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[1] All state defendants are jointly referred to herein as "state defendants," and the state officials named will be referred to as "individual state defendants."

[2] Now succeeded in office by William A. Allain.

[3] Now succeeded in office by Richard Molpus. As noted in footnote 4, infra, the Secretary of State is no longer a member of the State Board of Education.

Commission, State of Mississippi[4]; William A. Allain, Attorney General, member of the Board of Education and member of the Lieu Land Commission, State of Mississippi[5]: A. Michael Espy, Assistant Secretary of State, State of Mississippi."[6] Each of the individual state

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[4] This elective position of Superintendent of Education was abolished effective July 1, 1984, pursuant to amended Section 206 of the Constitution of the State of Mississippi, approved by referendum on November 1, 1983, and Section 37-3-39(2)(a) of the Mississippi Code of 1972, as amended. The constitutional amendment further removed the Superintendent of Education, the Attorney General, and the Secretary of State as members of the State Board of Education.

[5] Now succeeded in office by Edwin Lloyd Pittman. As noted above, the Attorney General of the State of Mississippi is no longer a member of the State Board of Education.

[6] No longer holds this position nor was he ever a member of the Board of Education or the Lieu Land Commission.

defendants and their "predecessors in office" were named in their official capacity only.

The petitioners are the county superintendents and boards of education in all or part of 23 counties and school children and parents in those counties. The crux of the allegations is that when the Chickasaw Tribe ceded its lands in Mississippi under the Treaty of Pontitock Creek[7] in 1832, the United States failed to to reserve the sixteenth sections located therein from the sale of all Chickasaw lands by the United States at public auction in order that the Chickasaw nation could "realize the greatest possible sum" therefrom.[8]

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[7] For simplicity, other references to this treaty will use the modern spelling of "Pontotoc."

[8] Article I, Treaty of Pontotoc.

Subsequently, pursuant to an Act of Congress on July 4, 1836[9], authority was granted for the counties then existing in the Chickasaw Cession to select the "lieu land" outside the counties, and this was accomplished. These lands were subsequently leased for ninety-nine (99) years in 1848 and were subsequently sold[10] as ratified by the Act of Congress of May 12, 1852.[11] The funds were then invested in railroad companies to secure the construction of railroads throughout the state. Due to the destruction of the railroads during the civil

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[9] 5 Stat. 116.

[10] Of interest is that representatives of the Chickasaw Cession counties voted in favor of these acts. Miss. House Journal of 1848, pp. 388, 537; Miss. Senate Journal of 1848, p. 711.

[11] 10 Stat. 6.

war, the securities received for such investments were rendered worthless.[12] Despite this, the state has continued to pay interest to the Chickasaw Cession counties on the corpus of the fund.

Section 212 of the Constitution of 1890 of the State of Mississippi established the Chickasaw Cession Lieu Land Fund and set the interest rate thereon.

The petitioners, in their original bill of complaint, seek the following specific relief from the state defendants in the form of "dollars or dirt:"

> a. "conveyance to them ... real and/or personal properties (including money) of equivalent income producing value" [as the original Sixteenth Sections in Chickasaw Cession];

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[12] The last Act in regard to the Chickasaw Cession lieu lands was in 1859 prior to the adoption of the Fourteenth Amendment to the Constitution of the United States.

b. "conveyance to them ... of other real and/or personal properties (including money) of equivalent income producing value" [as the original Chickasaw Cession lieu lands];

c. "That ... the defendants ... be enjoined and directed to take such actions as are necessary and appropriate to this set aside and make available for the use and benefit of the plaintiffs ... a fund or funds of such value and in such amount as may reasonably be necessary to:

1. Provide annual income to the respective Chickasaw Cession school districts hereafter at a level equivalent to the level of income which each could reasonably expect to enjoy if the district still owned in trust its original Chickasaw Cession sixteenth section lands or its original Chickasaw Cession lieu lands, whichever are the more valuable, and said lands were given over to their highest and best income producing use, and in addition,

2. To compensate and make whole plaintiffs and the plaintiff

class for all income their respective school districts could have received from 1832 to the present if they had been receiving the income from their respective Chickasaw Cession sixteenth section lands or, in the alternative, their respective Chickasaw Cession lieu lands, if such lands had been subjected to such prudent use and reasonable management ... as would have been required of trustees holding properties in trust and as would have produced maximum levels of annual income, and

3. To compensate plaintiffs and the plaintiff class for the interest that would have been earned on the funds described in (b)[2] above had said funds been received annually and immediately thereafter invested at the best rate of interest then available, and further, had said funds remained so invested continuously until

this time with interest compounded annually."

d. "Acquire, set aside, and make available for the use and benefit of the plaintiffs and the plaintiff class ... appropriate new lieu lands (which may include offshore oil, gas, and other mineral rights and interests owned by ... the State of Mississippi)";

e. "Take any and all other steps or actions as may be reasonably necessary or appropriate to:

1. Make available to plaintiffs and the plaintiff class properties of value equivalent to the current fair market value of the properties [allegedly] unlawfully sold ... or

2. Make available to plaintiffs and the plaintiff class in perpetuity income at such level as may be equitable and just, or

3. Eliminate and compensate and for the future guarantee and protect plaintiffs and the plaintiff class against ... denials and deprivations of

their rights to due process of law and to the equal protection of the laws";

f. "Develop, prepare, and file with the Court ... a plan for the orderly implementation of the declaratory and injunctive relief otherwise granted."

The complaint makes no contention or allegation that any current statute, law, or constitutional provision of the State of Mississippi is unconstitutional, nor do petitioners seek to have any so declared. The petitioners make no assertion in the complaint as to the provisions of the State or Federal Constitutions which were in effect at the time of the lease and sale of the lieu lands in question.

The respondents filed their motion to dismiss on October 2, 1981, and set forth various grounds therefor, including failure to state a claim, the Eleventh Amendment jurisdictional bar, applicable statutes of limitation, lack of standing to bring the action, and laches. Each of these positions, together with other grounds

were briefed, argued, and presented to the District Court.

The District Court, on January 20, 1984, dismissed the complaint against all state defendants based on the Eleventh Amendment jurisdictional bar and the applicable statutes of limitation. The United States Court of Appeals for the Fifth Circuit affirmed this dismissal on June 5, 1985, and the Petition for Rehearing and Suggestion of Rehearing En Banc was denied on May 21, 1985.

VI. REASONS FOR DENYING THE WRIT

A.

Should Certiorari Be Granted To Consider A Claim Seeking Damages Against The State Of Mississippi, Various Agencies Thereof, And Elected Public Officials Of The State Of Mississippi In Their Official Capacities Under The Fourteenth Amendment Which Is Jurisdictionally Barred By The Eleventh Amendment To The Constitution Of The United States.

The United States Court of Appeals for the Fifth Circuit in affirming the District Court's dismissal relied upon various decisions of this Court addressing the Eleventh Amendment jurisdictional bar including Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984).

The District and Circuit courts were eminently correct in dismissing the complaint in this matter on the basis of the Eleventh Amendment jurisdictional bar as provided by the United States Constitution.

Recent case authority holds that, at most, plaintiffs are only entitled to the relief requested in the complaint. Mississippi University for Women v. Hogan, 458 U.S. 718, 723, 102 S.Ct. 331, 73 L.Ed.2d 1090, 1097, fn. 7 (1982). Here, the petitioners seek only "dollars or dirt" from the respondents.

The Eleventh Amendment to the Constitution of the United States provides a constitutional jurisdictional bar to the petitioners bringing

this action in the United States District Court for any type of relief, whether prospective or retroactive, because this is, in effect, a suit against the State of Mississippi which it has not consented to. Edelman v. Jordan, 415 U.S. 651, 662, 663, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974); Florida Department of Health v. Florida Nursing Home Association, 450 U.S. 147, 67 L.Ed.2d 132, 101 S.Ct. 1032 (1981); Alabama v. Pugh, 438 U.S. 781, 57 L.Ed.2d 1114, 96 S.Ct. 2666 (1978); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 89 L.Ed. 389 (1945); Louisiana v. Jumel, 107 U.S. 711, 720-723, 727-728 (1892); Corey v. White, 457 U.S. 85, 91, 71 L.Ed.2d 694, 102 S.Ct. 2325 (1982); Pennhurst v. Halderman, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984); Atascadero State Hospital v. Scanlon, 473 U.S. ____, 87 L.Ed.2d 171, 105 S.Ct. _____ (1985); and Gay Student Services v. Texas A & M University, 737 F.2d 1317 (5th Cir. 1984).

The Eleventh Amendment to the Constitution of the United States reads as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

Although this amendment on its face does not bar suits against a state by its own citizens, this Court has consistently held that such suits are barred unless the particular state has consented to suit. See, Edelman v. Jordan, supra, at 662, 663. Florida v. Treasure Salvors, Inc., 458 U.S. 670, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982); Atascadero, supra. It is clear that in the absence of consent, a suit in which a state or one of its agencies or departments is the defendant is judicially barred by the Eleventh Amendment. In the State of Mississippi, statutory waiver is necessary. Horne v. State Building Comm., 233 M. 810, 103 So.2d 373 (1958), as this Court has also found in

Florida Department of Health v. Florida Nursing Home Association, supra, and Alabama v. Pugh, 328 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978). This jurisdictional bar applies regardless of the relief sought. Missouri v. Fisk, 290 U.S. 18, 27, 78 L.Ed. 145, 54 S.Ct. 18 (1933).

There is not room for doubt that the State of Mississippi, the Board of Education, and the Lieu Land Commission cannot be sued in the federal courts pursuant to the Eleventh Amendment jurisdictional bar. Alabama v. Pugh, supra. This jurisdictional bar applies likewise to the named defendants as the allegations in this cause are couched, and, as the lower courts found, since the Eleventh Amendment bars a suit against state officials when "the state is the real substantial party in interest." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 89 L.Ed. 389 (1945); In Re Ayers, 123

U.S. 443, 487-489 (1887); Louisiana v. Jumel, 107 U.S. 711, 720-723, 727-728 (1982).

> Thus "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. 57, 58, 10 L.Ed.2d 191, 83 S.Ct. 1052 (1963) (per curiam). "And as when the State itself is named as the defendant, a suit against state offices, that is, in fact, a suit against a state is barred regardless of whether it seeks damages or injuncture relief. See, Corey v. White, 457 U.S. 85, 91, 41 L.Ed.2d 694, 102 S.Ct. 2325 (1982). (Emphasis supplied).

Pennhurst v. Halderman, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984).

In Pennhurst, the Court went further in footnote 11 citing Dugan v. Rank, 372 U.S. 609, 10 L.Ed.2d 15, 83 S.Ct. 999 (1963), to say:

> The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain or interfere with the public administration, or if the effect of the judgment would be "restrain the Government from acting or to compel it to act."

It is beyond dispute that the relief sought by petitioners in their complaint, although now alleged to be only a suit for a mandatory injunction and not for retroactive relief, would "expend itself on the public treasury or domain" of the State of Mississippi and "interfere with the public administration" of the state and "restrain the [State of Mississippi] from acting" or, in the alternative, "compel it to act," and cause property to be disposed of belonging to the State of Mississippi.

As to the boards and commissions on which the individually named defendants serve, although not specifically named as defendants, this Court in Alabama v. Pugh, supra, put it very plainly:

> Among the claims raised here by petitioners is that the issuance of a mandatory injunction against the State of Alabama and the Alabama Board of Corrections is unconstitutional because the Eleventh Amendment prohibits federal courts from entertaining suits by private parties against states and their agencies ... . There can be no doubt ... that suit against the state and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit.

Of course, the Lieu Land Commission and the Board of Education are agencies of the State of Mississippi in the same manner that the Department of Corrections is an agency of the State of Alabama. The petition and complaint as filed in this matter do not even allege that the immunity of the State of Mississippi, the Lieu Land Commission, and/or the Board of Education has been waived or that any consent has been given to this suit. Further, the State of Mississippi has never consented to waive even its sovereign immunity in state court. See Chapter 474, Miss. General Laws of 1985, which re-establishes sovereign immunity through July 1, 1986, and waives the immunity only for claims accruing after that date but specifically does not waive Eleventh Amendment immunity. Specifically, § 3(4) of this Act provides that "nothing in this act shall be

construed to waive the immunity of the state from suit in federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States." This specific language was cited with approval in Pennhurst, supra, at footnote 12.

Further, the Mississippi Supreme Court has stated in Pruett v. City of Rosedale, 421 So.2d 1046 (Miss. 1983):

> We do not abolish by this opinion the historical and well-recognized principle of immunity granted to all legislative, judicial and executive bodies and those public officers who are visited with discretionary authority, which principle of immunity rests upon an entirely different basis and is left intact by this decision.

Therefore, certiorari is not merited on the basis of any federal claim.

B.

Should Certiorari Be Granted To Consider A Pendent State Law Claim Seeking Damages Against The State Of Mississippi, Various Agencies Thereof, And Elected Public Officials Of The State Of Mississippi In Their Official Capacities Which Is Also Jurisdictionally Barred By The Eleventh Amendment To The Constitution Of The United States.

As to any contention by the petitioners that they have asserted a pendent state law claim and, therefore, the Eleventh Amendment jurisdictional bar does not apply, Pennhurst, supra, also lays this issue to rest:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Pennhurst, supra, at 79 L.Ed.2d at 82.

Any claim by the petitioners that they are seeking prospective relief only simply will not survive close scrutiny of the complaint. What they are seeking are "dollars or dirt," and the only thing "prospective" about the relief sought is that it would have to be paid in the future from the public treasury or domain of the State of Mississippi after a decision favorable to the petitioners. The Pennhurst decision recognizes this in footnote 25 found on page 87:

> To say that injunctive relief against state officials acting in their official capacity does not run against the state is to resort to the fictions that characterize the dissent's theories. Unlike the English sovereign, perhaps, an American State can act only through its officials. It is true that the court in Edelman recognized that retroactive relief often, or at least sometimes, has a greater impact on the state treasury than does injunctive relief, see 415 U.S. 666, n. 11, but there was no suggestion damages alone were thought to run against the state while injunctive relief did not.

Pennhurst, supra, at 79 L.Ed.2d 87.

This Court's decision in Edelman v. Jordan, supra, is of particular note since it provides:

> It is well established that even though a state is not named as a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945), the Court said:
>
> > [W]hen the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are named defendants. Id., at 464, 89 L.Ed. 389.

The Edelman Court did not stop here, however, but went even further to find that:

> Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. Great Northern Life Insurance Co. v. Read, supra; Kennecott

Copper Corp. v. State Tax Commission, 327 U.S. 573, 90 L.Ed. 862, 66 S.Ct. 745 (1946).

What could be more on point? In the instant matter, the petitioners seek ("by legislative appropriation or otherwise") the establishment of a fund for the use and benefit of the plaintiffs having such amount of money or value as reasonably necessary to:

> a. to provide annual income to the plaintiffs at a level which each school district could expect if the district still owned the original Chickasaw Cession sixteenth section lands or lieu lands, whichever are the most valuable,
>
> b. "to compensate, reimburse and make restitution" to each school district for all income each would have received from 1832 to the present if each district had been receiving income from its respective Chickasaw Cession sixteenth section lands or lieu lands,
>
> c. acquire and make available for the use and benefit of the plaintiff class appropriate lieu lands of the same value as the original Chickasaw Cession sixteenth section lands, and

> d. other relief in the form of interest which may have been earned on the funds derived from the lease of such Chickasaw Cession sixteenth section lands or lieu lands.

If this is not a prayer for retroactive relief or an impingement on the state treasury, then what would be? Petitioners seek retroactive damages, and it can be classified as nothing else, from the State of Mississippi. Certainly, the named individual defendants cannot provide the relief requested, and it would have to be by legislative act. Therefore, although the petition is drawn in artful terms as to the named individual official defendants, it still could not, upon close examination, evade or circumvent the Eleventh Amendment jurisdictional bar. See, Gay Student Services v. Texas A & M University, supra.

Therefore, certiorari is not merited on the basis of any pendent state law claim.

CONCLUSION

The petitioners' contentions pose no question of particular moment or present any indecision in the case law of the land, and it is, therefore, respectfully submitted that the Petition for Writ of Certiorari in all justice should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Lloyd Arnold, an Assistant Attorney General for the State of Mississippi and Counsel of Record for the Respondents herein, do hereby certify that I have this day caused three (3) true and correct copies of the above and foregoing **Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit** to be served upon the following:

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This, the 12th day of November, 1985.

R. LLOYD ARNOLD
ASSISTANT ATTORNEY GENERAL

No. 85-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

B.H. PAPASAN
SUPERINTENDENT OF EDUCATION, *et al.*,
Petitioners,

v.

WILLIAM A. ALLAIN
GOVERNOR, STATE OF MISSISSIPPI, *et al.*,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

I: EXCERPTS FROM THE PLEADINGS AND THE RECORD BELOW

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

B. H. PAPASAN; [*et al.*]***

Plaintiffs

VERSUS

*** WILLIAM F. WINTER, GOVERNOR, STATE OF MISSISSIPPI, [*et al.*]***

Defendants

CIVIL ACTION NO. DC 81-90-WK-0

COMPLAINT

***

1.

Equity will not suffer a wrong without a remedy.

2.

In this action, Plaintiffs invoke the jurisdiction of this Court and seek to rectify an invidious and unconstitutional deprivation and discrimination which was visited upon the schoolchildren in the Chickasaw Cession counties of Mississippi more than 140 years ago and to which they have been subjected continuously ever since. In the Northwest Territory Ordinance of 1785, the United States declared and mandated that the public schools of all states of the Union be adequately supported and maintained, and, to

that end, dedicated the sixteenth section in each township in perpetual trust for such support and maintainance. The Defendants named below, and their predecessors in office, have divested the public school children of the Chickasaw Cession counties of these lands and have failed to provide property, income or support of equivalent current value in lieu thereof. The deprivations suffered by these children are such that they have not been provided a minimally adequate level of education. Furthermore, the children in these schools have seen children in other school districts in Mississippi, which have income from sixteenth section lands enjoy financial resources and receive educational opportunities greatly in excess of those provided in the Chickasaw Cession counties. It is to remedy this wrong, this breach of trust, this unjust, inequitable and unconstitutional deprivation of the rights of the children of the Chickasaw Cession counties, that this action has been conceived and brought.

3.

Declaratory and injunctive relief are sought against the Defendants in their various official capacities, as described more fully below, on behalf of all school age children residing in school districts in the Chickasaw Cession counties, to-wit: Alcorn, Benton, Chickasaw, Calhoun, Clay, a small part of Coahoma, all of Desoto, Itawamba, Lee, Lafayette, Marshall, Monroe, Panola, Pontotoc, Prentiss, part of Quitman, a small part of Tallahatchie, all of Tate, Tippah, Tishomingo, Tunica, Union, part of Webster and part of Yalobusha Counties. Such relief is sought, *inter alia*, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and, accordingly, 42 U.S.C. § 1983

4.

Plaintiff school districts recognize that they are vested with control and management of all sixteenth section lands and lieu lands and that they have authority to bring suit

to establish the title to such lands and to redress violations of rights related to such lands. In order that such actions may be efficiently instituted and prosecuted, Plaintiff School Districts here seek to establish first the proposition common to all such suits—the unconstitutionality, illegality and invalidity of the original sales of the Chickasaw Cession Sixteenth Section Land and the Chickasaw Cession Lieu Lands. Thereafter, these Plaintiffs seek individualized relief in the form of orders mandating and directing that Defendants provide and make available to the school district plaintiffs, to be held by the School District Plaintiffs in perpetual trust, assets of income-producing capacity equivalent in value to that of the Chickasaw Cession Sixteenth Section Lands and/or Chickasaw Cession Lieu Lands of which Plaintiff School Districts and the Plaintiff School Children have been deprived. Plaintiffs seek, *inter alia*, declaratory, injunctive and other equitable relief.

***

8.

Plaintiff school districts are all situated in whole or in substantial part in the Chickasaw Cession territory, that is, those lands in the State of Mississippi generally lying north of a straight line drawn from the Southwest corner of Tunica County on the Mississippi-Arkansas boundary through the northern part of Coahoma County, continuing through Quitman, Panola, the northwest tip of Tallahatchie, Yalobusha, Calhoun and Webster Counties, then meandering easterly through Clay and Lowndes Counties to a point on the Mississippi-Alabama boundary (hereinafter referred to as "the Chickasaw Cession lands").

9.

Plaintiff school children, together with the members of the class they represent (as defined hereinbelow), all now reside in or hereafter will reside in and attend or be eligible to attend one or more of the various public schools within the Chickasaw Cession lands.

10.

As described more fully hereinoelow, Plaintiffs for more than a century have been, now are being, and unless relief is granted by this Court, will continue in perpetuity to be subjected to arbitrary, irrational, invidious, unconstitutional and otherwise illegal deprivations and discriminations vis'-a-vis Mississippi's school children and school districts situated outside the Chickasaw Cession lands. Such deprivations and discriminations violate the rights of Plaintiffs guaranteed and protected by Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States, and by the Equal Protection Clause of the Fourteenth Amendment.

11.

As and whenever used hereinafter, the phrase "Plaintiffs and the Plaintiffs class" shall, and unless otherwise expressly provided to the contrary, mean and include

(a) the named Plaintiffs county boards of education and school districts, including their respective superintendents, board members, trustees or other governing chief executive officials, as named in Paragraph 6 of Section III(A) of this Complaint,

(b) the named Plaintiff school children, individually and by and through their parents, guardians and next friends, as named in Paragraph 7 of Section III(A) of this Complaint,

(c) all school children residing in the Chickasaw Cession counties and attending or eligible to attend public schools operated by school districts in whole or in part within the Chickasaw Cession lands,

(d) all ancestors and predecessors in interest of any of the parties within the scope of (a), (b) and (c) above,

(e) all children who may in the future reside in the Chickasaw Cession counties or otherwise in the future be-

come eligible to attend public schools operated by school districts in whole or in part within the Chickasaw Cession, and

(f) all descendants or other successors in interest of any of the parties within the scope of (a), (b), (c), (d) and (e) above.

13.

State Defendants

(a) The STATE OF MISSISSIPPI is a Defendant.

(b) WILLIAM F. WINTER is an adult resident citizen of Jackson, Mississippi and is the Governor of the State of Mississippi in whom is vested the chief executive power of the State of Mississippi.

(c) (i) EDWIN LLOYD PITTMAN is an adult resident citizen of Jackson, Mississippi, and is the Secretary of State of the State of Mississippi in whom is vested, and who is charged by law with, general supervision, management and administration of all Sixteenth Section Lands in Mississippi and all Sixteenth Section Lieu Lands in Mississippi, and with the execution and delivery of all duly authorized conveyances of public lands.

(ii) By virtue of enactment of the State of Mississippi, effective January 1, 1980 [Senate Bill No. 2470, Laws of Mississippi, 1978, Chapter 458, as codified in MISS. CODE (1972), Sections 7-11-1, et al.], Defendant Pittman, in his official capacity as Secretary of State, became vested with all powers, duties and responsibilities theretofore vested in the State Land Commissioner and the State Land Office.

(d) CHARLES E. HOLLADAY is an adult resident citizen of Jackson, Mississippi, and is the Superintendent of Education in Mississippi in whom is vested, and who is charged by law with, the general supervision of the com-

mon schools and of the educational interests of the State. Defendant Holladay maintains his official office at 501 Walter Sillers State Office Building, Jackson, Mississippi.

(e) EDWIN LLOYD PITTMAN, WILLIAM A. ALLAIN and CHARLES E. HOLLADAY are all adult resident citizens of Jackson, Mississippi, and are all members of the Board of Education of Mississippi, and have been charged by law with the management and investment of the school funds according to law. Defendants Pittman, Allain and Holladay, in their aforesaid official capacities, maintain their offices at 501 Walter Sillers State Office Building, Jackson, Mississippi.

(f) A. MICHAEL ESPY is an adult resident citizen of Jackson, Mississippi and is an assistant Secretary of State in charge of the land office of the State of Mississippi, now a division of the Office of the Secretary of State. As an assistant Secretary of State, Defendant Espy is charged by law with the general supervision of the Sixteenth Section Lands of the State of Mississippi. Defendant Espy maintains his official office at 401 Mississippi, Jackson, Mississippi.

(g) A. MICHAEL ESPY, WILLIAM A. ALLAIN and EDWIN LLOYD PITTMAN are all members of the Lieu Land Commission, and have been charged by law with the management and administration of all Sixteenth Section Lieu Lands in the State of Mississippi. Defendants Espy, Allain and Pittman, in their aforesaid official capacities, maintain their office at 401 Mississippi, Jackson, Mississippi.

***

14.

***

(b) The term "State Defendants" whenever used herein means and shall be deemed to include all of the Defendants listed in paragraph 13, jointly and severally, in their official capacities, together with their predecessors in office, their

successors in office, all agents, servants, employees and subordinates of each, together with all persons acting under the direction of or in concert with each, plus the State of Mississippi, including any relevant or appropriate agency, department or political subsdivisions thereof.

***

15.

The State Defendants, and each of them, and their predecessors in office, were at all times relevant hereto acting under color of law within the meaning and contemplation of 42 U.S.C. §1983 at the time of each and every violation and/or deprivation of the rights of Plaintiffs as described more fully elsewhere herein.

IV. CLASS ACTION

A. The Plaintiff Class

16.

(a) The above named Plaintiffs file this Complaint in their respective individual and official capacities described hereinabove, and on behalf of all other similarly situated, to-wit:

> All children residing in the above named counties within the Chickasaw Cession who are of school age and all children residing in or who may in the future reside in said area and who may in the future become of school age and all children who at this time are attending or who may in the future attend the public schools in any of said school districts and counties and within the Chickasaw Cession territory.

***

V. FACTS

17.

(a) Pursuant to Section 211 of its Constitution of 1890, the State of Mississippi has declared and provided that all sixteenth section lands shall be reserved for the support of the public schools. Section 211 prohibits the state from parting with the possession and control of sixteenth section lands except for a definite and comparatively short period of time. This provision that sixteenth section lands be set aside, reserved and held in trust for the use and benefit of the public schools dates back to 1817. Mississippi Constitution of 1817, Article VI, § 20.

(b) In 1978 the Mississippi Legislature enacted into law an act relating to the management of sixteenth section school lands. Laws of Mississippi, 1978, Chapter 525, also referred to as Senate Bill No. 2430. This enactment in Section 5 thereof [now codified in MISS. CODE (1972) 29-3-1(1), as amended] provided that

> Sixteenth section school lands, or lands granted in lieu thereof, constitute property held in trust for the benefit of the public schools and must be treated as such.

This enactment was and is declaratory of the law as it is and as it has been—with respect to the Chickasaw Cession Lands and/or Chickasaw Cession Lieu Lands—continuously since at least April 7, 1798.

***

21.

By statutory enactment effective April 7, 1798, the United States authorized the establishment of a government in the Mississippi territory (which included the Chickasaw Cession Lands). This enactment had the effect of applying to said territory all of the terms, provisions and conditions of the Northwest Oridnances of 1785 and 1787, and provided further that the people in said territory were entitled to the same rights, privileges, and advantages as the peoples of the Northwest Territory

> in as full and ample a manner as the same are possessed and enjoyed by the people of [the Northwest Territory]. 1 Stat. 549, 550 §6.

These "rights, privileges and advantages" included reservation of all Sixteenth Section lands for the use and benefit of the public schools.

22.

On April 14, 1802, Georgia and the United States entered into a compact by which Georgia ceded to the United States the territory which now is included in Mississippi, including the Chickasaw Cession lands. This compact further provided that the territories included could be admitted to the Union as states on the same conditions and restrictions, with the same provisions, and in the same manner as is provided in the aforesaid 1785 and 1787 Ordinances of Congress for the government of the western territory of the United States.

23.

By statutory enactment effective March 3, 1803, the Congress of the United States provided for the disposal of lands in the Mississippi territory. 2 Stat. 229. This enactment expressly provided, without exception for the Chickasaw Cession lands or any other lands, that

> the section number sixteen . . . shall be reserved in each township for the support of schools within the same.

24.

By statutory enactment effective April 21, 1806, the United States provided for the situtation where it might develop, upon survey, that lands in Section 16 had already been sold, the Secretary of Treasury shall locate another section, in lieu thereof, for use of schools, which location shall be made in the same township, if there be any other vacant section therein, and otherwise, in an adjoining township. 2 Stat. 400, 401 §6.

25.

On March 1, 1817, the Congress authorized the formation of the State of Mississippi. 3 Stat. 348. One of the provisions of the act of statehood was that the state so formed and its government so organized

> when formed, shall be republican, and not repugnant to the principles of the ordinance of the 13th day of July, 1787, between the people and the states of territory northwest of river Ohio, so far *as the same has been extended to the said territory by the ariticles of agreement between the United States and the States and the State of Georgia, or* of the Constitution of the United States. [Emphasis added].

As explained in paragraph 22 above, one of the provisions of the agreement between the United States and Georgia, now made applicable to Mississippi, was that Sixteenth Section lands should be reserved for the use and benefit of the public schools. This reservation, as noted above, had been expressly made applicable to Mississippi by the Act of March 3, 1803.

26.

A further recognition of the inviolability of the dedication of all Sixteenth Section lands (including the Chickasaw Cession Sixteenth Section lands) in trust for use and benefit of the public schools is the Act of March 3, 1817. 3 Stat. 375. In this Act, the United States appointed a surveyor to survey all lands south of Tennessee and north of Fort Williams and directed that he survey said lands according to the law. Thereafter, such lands were to be offered for sale

> with the expection of the Section No. 16, in each township, which shall be reserved for the support of the public schools therein, . . .

27.

By the Treaty of Pontotoc Creek, signed October 20, 1832, between the Chickasaw Nation and the United States, the Chickasaw Indians were removed from the lands comprising the Chickasaw Cession. [footnote omitted] All claims of the Chickasaw Indians in and the lands in the Chickasaw Cession Territory were thereby extinguished. Pursuant to the Treaty, all of the lands were to be sold to private parties with the proceeds of the sale were to be sold to private parties with the proceeds of the sale to be delivered to the Chickasaws. This was done by patents and other instruments of conveyance made and given in the name of the United States under the hands and seal of the President of the United States and other subordinate officers of the United States, i.e., the Federal Defendants.

28.

Both the Treaty and the sale of lands pursuant thereto violated the spirit and letter of the ordinances and enactments described hereinabove, and of the perpetual trust created as described above, in that the Sixteenth Sections were not reserved. Rather, these Sixteenth Section lands were sold off by the Federal Defendants into private hands as with all other lands comprising the Chickasaw Cession.

29.

In 1836, in recognition of the illegality of the sale of the Sixteenth Sections under the Treaty of Ponotoc Creek, the United States provided that each of the twenty-four Chickasaw Cession counties should select as lieu lands 640 acres for each 23,040 acres in its county. The United States further provided by enactment dated July 4, 1836, that such lands, once selected

> shall vest in the State of Mississippi, for the use of schools within said territory in said state, so ceded by the aforesaid by the Chickasaws; and said lands, thus selected, shall be holden by the

> same tenure, and upon the same terms and conditions, in all respects, as the said State now holds the land heretofore reserved for the use of the schools in said State. 5 Stat. 116, §2.

The Chickasaw counties then selected, subject to the above described provisions, approximately 174,555 acres in Bolivar, Coahoma, Tallahatchie, Quitman, Panola and Leake Counties. These lieu lands, therefore, became impressed with the same trust subject to the same terms, conditions and uses as the original Chickasaw Cession Sixteenth Section lands. These lands so selected are hereinafter referred to as the "Chickasaw Cession Lieu Lands".

30.

In 1848, Mississippi purported to authorize the sale of ninety-nine (99) year leases of the Chickasaw Cession Lieu Lands, renewable to the lessee or his heirs or assigns forever. Miss. Laws (1848), ch. 3, §§1 and 2, effective February 7, 1848. By reason of its being in derogation of the trusts created as explained elsewhere herein, this act was unlawful and void.

31.

Thereafter, the State Defendants, wholly without authority of law and in derogation of trust and the constitutional and statutory rights of Plaintiffs and in derogation of the trust expressly created by the aforesaid Act of July 4, 1836 and otherwise arising by implication of law, sold the Chickasaw Cession Lieu Lands to private persons.

32.

(a) In 1852 the United States, wholly unlawfully and in derogation of the trusts previously created, purported to ratify the sales made under the aforesaid Act of 1848 and purported grant to the State Defendants the authority to sell all lands in the State of Mississippi theretofore reserved for the use of the schools. 10 Stat. 6. The act

further provided that the proceeds of the sales of said lands should be invested

> for the use and support of schools within the several townships and districts for which they were originally reserved and set apart, and for no other use, or purpose whatsoever.

As mentioned above, the Chickasaw Cession Sixteenth Section and Lieu Lands were sold and/or had their sales ratified under this enactment but the proceeds thereof were not set aside and reserved as provided therein. Rather the funds were invested by the State Defendants in unwise, imprudent and unlawful investments - wholly outside the lawful investment powers of trustees and other fiduciaries with respect to the properties held by them in trust. By reason of the defaults of the State Defendants, these investments have all failed and the funds have accordingly been lost.

(b) The aforesaid act of May 19, 1852, further provided that no sales of Sixteenth Section or Lieu Lands could be made without consent of the inhabitants of such township or district having lawfully been obtained. Such consent has never lawfully been obtained. More specifically, such consent has never lawfully been obtained from Plaintiffs and the Plaintiff class, minors all.

(c) As indicated above, the same enactment purported to ratify all sales theretofore made. Such ratification, being in derogation of a perpetual and irrevocable trust the beneficiaries of which were, are, and always will be, minors, was and is unlawful and void.

33.

By enactment dated March 3, 1857, in further derogation of the trust created as aforesaid, the United States purported to ratify all previous sales of Chickasaw Cession Sixteenth Section Lands and to authorize sales of all other such lands.

34.

In addition to the powers and duties vested in the Secretary of the Treasury by the Act of April 21, 1806, the United States of America, on or about February 26, 1859, in an enactment subsequently amended and now codified in Title 43, United States Code, Sections 851, et seq., made provision that, where sixteenth section lands had been subjected to private claims, other lands of equivalent value were then (and to this day remain) appropriated and granted to the states and their respective political subdivisions (such as the School District Plaintiffs named in paragraph 6 above) subject to the same trust for the benefit of the schools. The lands so appropriated were made subject to selection by the respective states in accordance with the terms, provisions and restrictions of 43 U.S.C. §852. Under that statute, the State Defendants and their predecessors in office have since February 26, 1859, had the right and the duty to select and acquire, for the use and benefit of Plaintiffs and the Plaintiff Class, appropriate and equivalent lieu lands. On information and belief, the State Defendants have whollly failed and refused to select and acquire such lieu lands.

***

36.

In addition, the United States and/or the State of Mississippi now own or have some right, title and interest in valuable real properties (including but not limited to oil, gas and mineral rights and interests) other than Sixteenth Section Lands, which properties could, in the alternative, be made available to Plaintiffs as new lieu lands.

37.

From 1798 until the present, the Defendants have guaranteed to and secured to all other school districts and school children in Mississippi in perpetuity the full use and benefit of Sixteenth Section lands in their respective townships and counties.

38.

The discriminations between Plaintiffs and the Plaintiff class, on the one hand, and all other school districts and school children in Mississippi, on the other hand, as aforesaid, are the result of deliberate, intentional and purposive actions by Defendants and their predecesors in office. These discriminations have not resulted from natural differences in the value of properties or other factors not intended by Defendants or beyond Defendants' control.

39.

As a result of the aforesaid deprivations to Plaintiffs and the Plaintiff class of the use and benefit of the Chickasaw Cession Sixteenth Section lands within their respective school districts, and/or of the Chickasaw Cession Lieu Lands, Plaintiff school children and the class they represent have been and will be deprived of a minimally adequate level of education.

40.

Neither the school district Plaintiffs nor the Plaintiff school children together with the Plaintiff class, have ever consented to, waived or otherwise acquiesed in aforesaid sales, first, of the Chickasaw Cession Sixteenth Section Lands, or, second, of the Chickasaw Cession Lieu Lands, nor, thirdly, any of the other illegal or unconstitutional actions of Defendants as described herein or as may appear upon full hearing hereof.

VI. CLAIMS

A. Declaratory Claims

41.

By reason of their derogation of the perpetual and irrevocable trust created as aforesaid, and their violation of the Northwest Territory Ordinance of 1785 as made ap-

plicable to Mississippi in the United States-Georgia Compact of 1802, those statutes of the United States, insofar as they purport to authorize, validate or confirm sales of the Chickasaw Cession Sixteenth Section lands and/or the Chickasaw Cession Lieu Lands, are unlawful, void and unenforceable, including but not limited to

(a) the Act of July 4, 1836. 5 Stat. 116
(b) the Act of May 19, 1852. 10 Stat. 6
(c) the Act of March 3, 1857. 11 Stat. 200
(d) any other acts of Congress having said effect.

Plaintiffs seek a declaratory judgment to the foregoing effect.

42.

By reason of their derogation of the trust created as aforesaid, and their violation of the Northwest Territory Ordinance of 1785 as made applicable to Mississippi in the United States-Georgia Compact of 1802, those statutes of the State of Mississippi, insofar as they purport to authorize, validate or confirm sales of the Chickasaw Cession Sixteenth Section and/or the Chickasaw Cession Lieu Lands are unlawful, void and unenforceable, including but not limited to

(a) Act of 1848, Miss. Laws (1848), ch. 3
(b) Any other similar enactments of the State of Mississippi.

Plaintiffs seek a declaratory judgment to that effect.

B. Derogation of Trust

43.

Effective at the time of statehood, 1817, the Chickasaw Cession Sixteenth Section Lands were impressed with an express/constructive trust irrevocably and in perpetuity for the use and benefit of Plaintiffs and the Plaintiff class, their ancestors and other predecessors, and their respective descendants and other sucessors. The sale of the Chickasaw Cession Sixteenth Section Lands by Defendants

in 1832 and thereafter, as aforesaid, thus violated the terms of said trust and was in gross derogation of the rights vested in Plaintiffs and the Plaintiff class.

44.

As a result of the designation and setting aside of the Chickasaw Cession Lieu Lands pursuant to the Act of 1836, as aforesaid, said lieu lands likewise became impressed with an express/constructive trust irrevocably and in perpetuity for the use and benefit of Plaintiffs and the Plaintiff class, their ancestors and other predecessors, and their descendants and other successors. The sale of the Chickasaw Cession Lieu Lands by Defendants in 1848 and thereafter as aforesaid thus violated the terms of said trust and was in gross derogation of the rights vested in Plaintiffs and the Plaintiff class.

45.

As Trustees, the State Defendants have at all times relevant hereto had the duties

(a) to deal with, manage and supervise the properties held by them in trust in utmost good faith and fidelity towards Plaintiffs and the Plaintiff Class,

(b) to make no sales, investments, or other alienations of such properties except upon authority of law (which authority has never been and cannot lawfully be obtained) and only then for the best price reasonably obtainable therefor,

(c) to account to Plaintiffs and the Plaintiff Class at reasonable periodic intervals reporting in full and with candor upon their stewardship of the properties held in trust,

(d) wherever property held in trust has been unlawfully sold or otherwise alienated, to set aside, restore to or otherwise make available for the use and benefits of the beneficiaries - here Plaintiffs and the Plaintiff Class - such

real and/or personal property (including a fund of money) as may have a value sufficient to make up for that the benefit of which the beneficiaries would otherwise have had, and

(e) generally, to compensate the beneficiaries and make them whole for any and all losses sustained as a result of the Trustees' mismanagement or other breach of their fiduciary duties.

For breach of each of the aforesaid duties, Plaintiffs and the Plaintiff class assert a claim here to surcharge the State Defendants.

***

47.

As described above, the State Defendants, acting under color of state law, failed to reserve either the Chickasaw Cession Sixteenth Section Lands or the Chickasaw Cession Lieu Lands and to respect the trust to which those lands were subject and in which they were held. Accordingly, Plaintiffs seek redress and assert claims against the State Defendants for violation of rights created and secured to Plaintiffs and the Plaintiff Class by

(a) the Northwest Territory Ordinance of May 20, 1785,

(b) the Ordinance of July 13, 1787,

(c) the Mississippi Territory Act of April 7, 1798, 1 Stat. 549, 550 §6,

(d) the United States-Georgia Compact of 1802,

(e) the Act of March 3, 1803, 2 Stat. 229

(f) the Act of March 3, 1817, 3 Stat. 375,

(g) the common law of trusts as the same has been received, accepted and placed in full force and effect by the State of Mississippi, and

(h) other laws of the United States and the State of Mississippi as may be designated prior to trial.

Inasmuch as each ordinance or statute just described in subparagraphs (a) through (g) constitutes a "law of the United States "Plaintiffs also assert a claim against the State Defendants under 42 U.S.C. §1983.

***

D. Due Process

50.

(a) By their past, present and future deprivation of Plaintiffs' and the Plaintiff class' rights to the use and benefit of the Chickasaw Cession Sixteenth Section Lieu Lands and/or the Chickasaw Cession Lieu Lands, Defendants have acted to deprive Plaintiffs and the Plaintiff class of protected, vested property interests, to-wit: their interests as beneficiaries of the trusts created as aforesaid, without due process of law. In this manner and in other ways to be shown at the trial of this action, Defendants have denied Plaintiffs' rights protected under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 10, Mississippi Constitution of 1817, which is presently found in Article 3, Section 14, Mississippi Constitution of 1890. Plaintiffs accordingly assert a claim against Defendants under each of these constitutional provisions. In addition, Plaintiffs assert a claim against State Defendants under 42 U.S.C. §1983.

(b) The State of Mississippi has voluntarily and intentionally chosen to extend to all children, including Plaintiffs and the Plaintiff class, between certain specified ages the right to and opportunity for a free appropriate public education. Literally, for more than a century, a major and intergral part of providing such education has been holding all Sixteenth Section Lands in trust for the use and benefit of the schools. The income derived from these Sixteenth Section Lands is a substantial source of the educational benefits so enjoyed. Having originally made these benefits available, the Defendants thereafter, as described more fully hereinabove, arbitrarily, unreasonably and without due process of law withdrew same from Plaintiffs and the Plaintiff class. By having thus deprived Plaintiffs and the Plaintiff Class of a substantial portion of their right and

entitlement to a free appropriate public education, Defendants have denied them rights protected under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 10 of the Mississippi Constitution of 1817, which is presently found in Article 3, Section 14 of the Mississippi Constitution of 1890. Plaintiffs accordingly assert a claim against Defendants under each of these constitutional provisions. In addition, Plaintiffs assert a claim against the State Defendants under 42 U.S.C. §1983.

E. Equal Protection

51.

By their aforesaid past, present and future deprivations of and to Plaintiffs and the Plaintiff class of the use and benefits of their Sixteenth Section Lands, while at the same time granting to and securing to all other school districts and school children in the State of Mississippi in perpetuity the use and benefit of their Sixteenth Section Lands, the State Defendants have deliberately, intentionally, purposefully and with design denied to Plaintiffs and the Plaintiff class the equal protection of the laws in violation of their rights secured by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs accordingly assert a claim against the State Defendants under 42 U.S.C. §1983.

52.

As alleged more fully herein, the State Defendants acting under color of state laws have

(a) infringed upon fundamental rights of Plaintiffs and the Plaintiff class, and/or

(b) operated to the disadvantage of a suspect class, to-wit: Plaintiffs and the Plaintiff class.
Accordingly, Plaintiffs' equal protection claims should be adjudicated under the strict judicial scrutiny test.

53.

By their aforesaid past, present and future purposeful and deliberate action, the State Defendants and their predecessors in office have absolutely, completely and permanently, denied to Plaintiffs and the Plaintiff class a fundamental right or interest, to-wit: their vested property right or interest (described hereinabove) in and to the Sixteenth Section Lands of their respective counties and school districts. By way of contrast, the State Defendants have assured and guaranteed to all other school children and school districts in Mississippi property rights or interests legally equivalent to those denied to Plaintiffs and the Plaintiff class. In so doing, the State Defendants have denied to Plaintiffs and the Plaintiff class the equal protection of the laws in violation of their rights secured by the Fourteenth amendment to the Constitution of the United States. Plaintiffs accordingly assert a claim against the State Defendants under 42 U.S.C. §1983.

54.

In addition, by their aforesaid past, present and future purposeful and deliberate actions, the State Defendants and their predecessors in office have absolutely, completely and permanently denied to Plaintiffs and the Plaintiff class a fundamental right or interest, to-wit: their rights to and interest in a minimally adequate level of education, or reasonable opportunity therefor. By way of contrast, the State Defendants have assured and guaranteed this right/interest to all other school children and school districts in Mississippi. The State Defendants accordingly have denied to Plaintiffs and the Plaintiff class the equal protection of the laws, for which Plaintiffs seek redress under 42 U.S.C. §1983.

55.

Here the disfavored class, Plaintiffs and the Plaintiff class as described hereinabove, is easily and objectively identifiable. The discrimination claim presented here reveals two classes constitutionally entitled to equivalent treatment by the State Defendants. The first class, Plaintiffs and the Plaintiff class, have been denied certain funda-

mental rights described elsewhere herein, while the same or equivalent rights have been guaranteed to and secured to all other school districts and school children in Mississippi. The creation of the two classes and the invidious discrimination worked against Plaintiffs and the Plaintiff class is without the remotest semblance of a rational basis. It is likewise wholly irrelevant and unrelated to the achievement of any legitimate state objectives. In the alternative, the means chosen by the State Defendants to effectuate the state's objectives (whatever those may be) are not rationally related to their achievement but rather work an invidious and totally unfair discrimination on Plaintiffs and the Plaintiff class.
[paragraph omitted]

G. Impairment of Obligations of Contracts

57.

Any and all actions of the State Defendants and their predecessors in office, which confirmed or ratified the sale of the Chickasaw Cession Sixteenth Section Lands in violation and derogation of trust, as aforesaid, constitute unconstitutional impairments of the obligations of contracts in violation of Article 1, Section 10 of the United States Constitution and of Art. 3, Section 16 of the Mississippi Constitution of 1890 and are therefore void. For redress, Plaintiffs assert a claim against State Defendants under 42 U.S.C. §1983.

58.

Any and all actions of the State Defendants and their predecessors in office through which the Chickasaw Cession Lieu Lands were sold, or which confirmed or ratified the sale of said lieu lands, in violation and derogation of trust as aforesaid, likewise constitute unconstitutional impairments of the obligations of contracts as aforesaid. For redress, Plaintiffs assert a claim against the State Defendants under 42 U.S.C. §1983.

***

H. Taking Without Just Compensation

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60.

Any and all actions of the State Defendants through which the Chickasaw Cession Sixteenth Section Lands and/or the Chickasaw Cession Lieu Lands were sold or otherwise removed from the reservation and trust described hereinabove constitute a taking of the property rights and interests of Plaintiffs and the Plaintiff Class without due compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and of Article 3, Section 17 of the Mississippi Constitution of 1890. For redress, Plaintiffs assert a claim against the State Defendants thereunder.

VII. RELIEF

61.

Sitting as a Court of Equity, this Court has broad and flexible powers to formulate and decree remedies appropriate to vindicate the rights of Plaintiffs and the Plaintiff class and also to promote the best interests thereof, all consistent with the public interest and the legitimate private interests of persons who are or may be affected.

62.

Plaintiffs and the Plaintiff Class are entitled to be made whole. One way in which this may be done, and which the Court may order Defendants to do, would be the establishment (by legislative appropriation or otherwise) of a fund, to be held in perpetual and irrevocable trust for the use and benefit of Plaintiffs and the Plaintiff Class, having such amount of money or value contained therein as may reasonably be necessary.

(a) to provide annual income to the respective Chickasaw Cession School Districts hereafter at a level equivalent to the level income which each could reasonably expect to enjoy if said District still owned in trust its original Chickasaw Cession Sixteenth Section Lands, or its original Chickasaw Cession Lieu Lands, whichever are the most valuable, and, if said lands were utilized at their highest and best income producing use, *and*

(b) to compensate, reimburse amd make restitution to each of said school districts for all income each would have received from 1832 until the present if each had been receiving the income from its respective Chickasaw Cession Sixteenth Section Lands, or, in the alternative, its respective Chickasaw Cession Lieu Lands, if such lands had been subjected to such reasonable use and prudent management (which would have included utilizing said lands at their highest and best income producing use) as would have been required of trustees holding properties in trust and as would have produced maximum levels of annual income, plus interest from the year in which such income would have been received, compounded annually.

***

65.

In the alternative and/or in combination, the State Defendants should be ordered and directed to acquire and make available for the use and benefit of Plaintiffs and the Plaintiff Class appropriate lieu lands of the same value as the original Chickasaw Cession Sixteenth Section Lands. State Defendants, among other means of so doing, may designate and select lieu lands as provided by 43 U.S.C. §852.

66.

In the alternative and/or in combination, all Chickasaw Cession Sixteenth Section Lands and all Chickasaw Cession Lieu Lands which are now held by either the United States or by the State of Mississippi, or any agency or

political subdivision of either of them, should be declared subject to the aforesaid trust.

67.

Plaintiffs and the Plaintiff class are aware that most of the Chickasaw Cession Sixteenth Section Lands and most of the Chickasaw Cession Lieu Lands are now claimed by persons who acquired said lands in good faith and for valuable considerations. Many of such persons have made valuable improvements on said lands and have otherwise in good faith relied to their detriment on the belief that they owned good title in and to such lands. Many mortgage lenders in good faith have advanced money against the security of such lands. Title insurance companies have in good faith written policies of title insurance on said lands.

Attorneys have in good faith rendered opinions respecting the titles to said lands. Plaintiffs are aware that the above described facts and circumstances would entitle them to a decree declaring all Chickasaw Cession Sixteenth Section Lands, or, in the alternative, all Chickasaw Cession Lieu Lands, to be held in trust accordance with Miss. Code (1972) §§29-3-1, et seq., as amended. Sitting as a court of equity, however, this Court has the power, and indeed, the reponsibility to provide less drastic relief. There are many ways in which Plaintiffs and the Plaintiff Class may be compensated for their past losses and protected and made whole for the future short of a decree that the aforesaid lands be returned to the schools to be held in trust. The Defendants who have caused the losses and discriminations suffered by the Plaintiffs and the Plaintiff class, not the innocent owners of said Sixteenth Section Land and Lieu Lands. Plaintiffs hereinafter pray for such less drastic but nevertheless adequate remedies.

68.

Plaintiffs have suggested herein, and below prayed for, a variety of different forms of relief. First and foremost,

Plaintiffs seek and claim that they are entitled to the establishment of a trust fund formed and computed as described in Paragraph 62 above and in subsection (c)(1) of the Prayer or an order for an annual legislative appropriation in an amount necessary to make whole Plaintiffs and the Plaintiff class. Nevertheless, Plaintiffs suggest that provision of appropriate redress, remedy, and relief of and from the unlawful and discriminatory conditions and circumstances described above may require a combination of two or more of the various forms of relief suggested here and for which prayer is hereinafter made, or the development of still other forms of relief not mentioned here and the decreeing and implementation of same either alone or in conjunction with specific forms of relief suggested herein. All suggestion for and prayers for relief should be construed in this light and should be treated as individual prayers for relief, joint prayers, or as components forming part or the whole of an overall decree effectively making Plaintiffs and the Plaintiff Class whole and protecting and vindicating their rights.

***

IX. PRAYER

WHEREFORE, premises considered, Plaintiffs, individually and on behalf of the Plaintiff Class, pray

(A) that this action be certified as a class action and that Plaintiffs and their undersigned counsel of record be appointed as representatives of the Plaintiff class as defined in paragraph 16(a) hereinabove;

(B) that, after a full hearing and trial of the merits of this action, the Court will grant in favor of Plaintiffs and the Plaintiff Class a declaratory judgment which in substance will declare and adjudicate

(1) that, for reasons described hereinabove, the original patents and/or sales of the Chickasaw Cession Sixteenth Section Lieu Lands made by the Federal

Defendants were unconstitutional, illegal and without authority of law; provided, however, that inasmuch as most of these lands are now privately claimed by persons who are good faith purchasers of value who have relied substantially to their detriment on the validity of their respective titles in and to such lands, Plaintiffs seek as relief conveyance to them, subject to the above described trust, real and/or personal properties (including money) of equivalent income producing value rather than the return of the said Sixteenth Section Lands;

(2) that, for the reasons described hereinabove, the original patents and/or sales of the Chickasaw Cession Lieu Lands were unconstitutional, illegal and without authority of law; provided, however, that inasmuch as most of these lands are now privately claimed by persons who are good faith purchasers forvalue who have relied substantially to their detriment on the validity of their respective titles in and to such lands, Plaintiffs seek as relief conveyance to them, subject to the above described trust, real and/or personal properties (including money) of equivalent income producing value rather than the return of the original Chickasaw Cession Lieu Lands;

(3) that, as described more particularly hereinabove, Defendants and their predecessors in office hav deprived and are depriving Plaintiffs and the Plaintiff Class of property and educational rights in which they have vested beneficial interest without due process of law and without due or just compensation therefor;

(4) that, as described more particularly hereinabove, Defendants and their predecessors in office have denied and are denying to Plaintiffs and the Plaintiff Class the equal protection of the laws;

(5) that, under the facts and circumstances described more particularly hereinabove, Defendants and their predecessors in office have denied to Plaintiffs

and the Plaintiff Class and deprived them of rights protected and secured to them by the Ninth Amendment;

(C) that, in addition, the Defendants, their successors in office, their agents, servants and employees, and all persons acting in concert with them, jointly and severally, be enjoined and directed to take such actions as may be necessary and appropriate to

(1) set aside and make available for the use and benefit of Plaintiffs and the Plaintiff Class, subject to the terms and provisions of the aforesaid perpetual and irrevocable trust, a fund or funds of such value and in such amount as may reasonably be necessary.

(a) to provide annual income to the respective Chickasaw Cession School Districts hereafter at a level equivalent to the level of income which each could reasonably expect to enjoy, if said District still owned in trust its original Chickasaw Cession Sixteenth Section Lands, or its original Chickasaw Cession Lieu Lands, whichever are more valuable, and said lands were given over to their highest and best income producing use, *and*, in addition,

(b) to compensate and make whole Plaintiffs and the Plaintiff Class for all income their respective school districts would have received from 1832 until the present if they had been receiving the income from their respective Chickasaw Cession Sixteenth Section Lands, or in the alternative, their respective Chickasaw Cession Lieu Lands, if such lands had been subjected to such prudent use and reasonable management (which would have included placing said lands in their highest and best income producing use) as would have been required of trustees holding properties in trust and as would have produced maximum levels of annual income, *and*

(c) to compensate Plaintiffs and the Plaintiff class for the interest that would have been earned on the funds computed as described in (b) above had

said funds been received annually and immediately thereafter invested at the best rate of interest then available, and further, had said fund remained so invested continuously until this time, with interest compounded, annually;

(2) acquire, set aside and make available for the use and benefit of Plaintiffs and the Plaintiff Class subject to the terms and provisions of the aforesaid perpetual and irrevocable trust appropriate new lieu lands (which may include offshore oil, gas and other mineral rights and interests owned by the United States and/or by the State of Mississippi);

(3) take any and all other steps or actions as may be reasonably necessary or appropriate to

(a) make available to Plaintiffs and the Plaintiff Class properties of value equivalent to the current fair market value of the properties unlawfully sold as aforesaid, or

(b) make available to Plaintiffs and the Plaintiff class in perpetuity income at such level as may be equitable and just, or

(c) eliminate and compensate and for the future guarantee and protect Plaintiffs and the Plaintiffs class against the above described denials and deprivation of their rights to due process of law and to the equal protection of the laws;

(4) develop, prepare and file with the Court, and subject to confirmation and approval by the Court, a plan for the orderly implementation of the declaratory and injunctive relief otherwise granted;

(D) that they be granted general relief; that is, that Plaintiffs and the Plaintiff Class be granted all relief to which they are entitled under the law and the facts, whether such relief in whole or in part has been specifically demanded herein or not;

(E) that the Court will fashion such other orders, injunctions, decrees and remedies as may be equitable and just to the end that the rights of Plaintiffs and the Plaintiff Class, as aforesaid, will be vindicated, protected and guar-

anteed consistent with the public interest and the orderly administration of equity and justice;

(F) that the Court will retain jurisdiction for such period of time after final adjudication of the merits hereof as may be necessary and appropriate to assure that the orders and decrees of the Court are fully implemented;

(G) that the Court will award to Plaintiffs and tax against the Defendants all Court costs, Plainitffs' reasonable attorneys' fees and other legal expenses.

***

MOTION TO DISMISS AND MOTION FOR ORDER THAT THIS ACTION IS NOT MAINTAINABLE AS A CLASS ACTION

COME NOW the State of Mississippi and the other state defendants in their official capacities, and move this court to dismiss the complaint that has been filed in this action which seeks declaratory and injunctive relief as well as damages, or in the alternative, to issue its order that this action is not maintainable as a class action and in support thereof, would show unto the Court the following:

1. The complainants failed to state a claim against the state defendants upon which relief can be granted.

2. There is no alleged case or controversy between the plaintiffs and the state defendants so as to confer jurisdiction upon this Court.

3. The plaintiffs cannot bring this suit on behalf of a class based upon a cause of action in which they have no rights.

4. The practices, policies, conditions, laws and statutes and constitutional provisions which allegedly exist as to a particular plaintiff in a particular county confer no right upon the particular plaintiff to allege similar practices in other counties named in this action or in any of the other counties located in the State of Mississippi within the "Chickasaw Cession" or in the "Chickasaw Cession lieu lands".

5. There are not common questions of law and/or of fact common to the plaintiff class.

6. There are not questions and/or of fact common to the defendants.

7. The prosecution of separate actions by individual members of the plaintiff class creates no risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for these plaintiffs or for the various classes of plaintiffs.

8. The prosecution of separate actions by individual members of the plaintiff class would create no risk of adjudication with respect to individual members of a class which would, as a practical matter, be dispositive of the interest of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interest, if any.

9. The maintenance of this action as a class action would be unmanagable.

10. The allegations of the complaint conclusively show that the defendants named herein have taken no overt actions which would be detrimental to any of the plaintiffs and, therefore, there exists no common questions of fact as to each of the various named defendants.

11. No injunctive or declaratory relief can be granted in favor of the plaintiffs against the State of Mississippi and/or the agencies thereof and such claims are barred by the Eleventh Amendment to the Constitution of the Unites States.

12. The awarding of injunctive relief in favor of the plaintiffs and against the defendants in respect to absent plaintiff class members would be violative of rights guaranteed to the absent plaintiff class members by the Fourteenth Amendment to the Constitution to the United States.

13. The allegations contained in the complaint, the statutory law of the State of Mississippi, the statutory law of the United States of America, the Constitution of the State of Mississippi, the Constitution of the United States of America, and the decisions of the Courts of the State of Mississippi and of the United States, all of which this Court can take judicial notice, affirmatively show that the defendants have acted in no way to deprive the named plaintiffs and/or the class they seek to represent of any rights secured to them.

14. The plaintiffs have wholly failed to show the commonality or typicallity required by Rule 23(a)(2) and (3)

and, therefore, the adequacy of class representation by the named plaintiffs and between the named plaintiffs has not been demonstrated.

15. The defendants enjoy absolute immunity from this cause of action.

16. The named plaintiffs have no standing to bring this cause of action.

17. The claims of the named plaintiffs are barred by the applicable statutes of limitation.

18. The claims of the named plaintiffs and the class they seek to represent are barred by the doctrine latches.

19. The treaties with the various indian tribes indiginous to these United States are the Supreme Law of the Land and, therefore, any claims by the plaintiffs seeking to override said Indian treaties must fail and are of no force or effect.

20. This complaint fails to conform to the provisions of Rule 8 of the Federal Rules of Civil Procedures.

21. The plaintiffs and the class they seek to represent are attempting to proceed under retroactive statutes and they are barred from doing so.

22. The plaintiffs and the class they seek to represent have no standing to maintain this action.

23. The plaintiffs are collaterally estopped from bringing and maintaining this cause.

24. The school board have not secured the authority to bring this action on against the state officials or state agencies.

Respectfully submitted,

THE STATE OF MISSISSIPPI, et al.

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SPECIAL REPORT

ON

CHICKASAW CESSION

SCHOOL DISTRICTS

RAY MABUS
STATE AUDITOR

DICK MOLPUS
SECRETARY OF STATE

ISSUED
NOVEMBER 1984

INTRODUCTION

This is a special report that compares sixteenth section receipts with Chickasaw Cession receipts by Mississippi Public School District for the 1983 fiscal year. It provides a brief history of the Chickasaw Cession schools and some general concerns stemming from the lack of money available to Chickasaw Cession school districts.

The data for this report were taken from the annual reports filed by each local school district superintendent of education with the State Department of Education and from the Secretary of State's Biennial Report on sixteenth section lands. The figures were not audited by the State Auditor's office.

Affected Counties

The Chickasaw Cession school districts are comprised of the school districts in the following counties:

1. Alcorn
2. Benton
3. Calhoun
4. Chickasaw
5. Clay
6. Coahoma
7. DeSoto
8. Itawamba
9. Lafayette
10. Lee
11. Marshall
12. Monroe
13. Panola
14. Ponotoc
15. Prentiss
16. Quitman
17. Tallahatchie
18. Tate
19. Tippah
20. Tishomingo
21. Tunica
22. Union
23. Webster
24. Yalobusha

Of These 24 counties, nine also have some sixteenth section lands:

1. Calhoun
2. Clay
3. Coahoma
4. Monroe
5. Panola
6. Quitman
7. Tallahatchie
8. Webster
9. Yalobusha

BACKGROUND

The history of the Chickasaw Cession runs from 1832 to the present. A treaty of cession was made and entered into by General John Coffee, who was duly authorized by the President of the United States, and the whole Chickasaw Nation, in General Council assembled at the Council House, on October 20, 1832. The results of this treaty ceded the lands north of a line drawn from the southwest corner of Tunica County to the northwest corner of Lowndes County, embracing in whole or in part 24 counties. Terms of this treaty specified that lands should be surveyed and sold at an agreed upon minimum price, proceeds from which were to go to the Chickasaw Indian Tribe. The treaty is known as the Ponotoc Creek Treaty and was ratified on March 1, 1833, after which the immediate survey was authorized and land sales begun. As news spread that cheap land was available, it appears that buyers came and land sales were rapid, and it also appears that these rapid transactions contributed to the neglecting of sixteenth section reservation for the benefit of township schools. This mistake was noted and the United States Government, in an effort to correct this error, issued lands in lieu of those sold sixteenth sections in various parts of the state, most of which being given from lands the government owned in the Delta counties.

The total amount of land ceded in the Chickasaw Purchase was 6,283,804 acres. The 36th part of this amount was 174,555 acres, being the amount of land given in lieu of those sixteenth section sales. A review of the original survey approved February 8, 1838, reestablished the north boundary aproximately three miles south of the Tennessee line and reduced the amount of acres to 6,071,169.2, but apparently the amount of lieu lands remained constant. The Mississippi Legislature in 1848 authorized a 99 year lease "renewable forever" at a price not less that $6 per acre, the proceeds to be a charge upon the state to be held in trust. The total sale yielded aproximately $1,047,330. The 1856 legislature authorized the use of these

funds at eight percent interest to be paid to the counties in the Chickasaw Cession on a per acre basis. Loans were made to various railroad companies at an interest of eight percent. A legislative act in 1863 authorized the railroads to pay their indebtedness in gold, silver, or treasury notes of the state into the State Treasury to be used to defray ordinary state expenses. In so doing, the state bound itself to pay the interest to the various counties in the Chickasaw Cession. The railroad companies eventually defaulted in payments or made settlements with worthless paper resulting in almost a total loss. Since this time, the state Legislature has appropriated monies representing the amount of interest lost due to these investment failures; however, the amount of interest has been reduced to six percent since enactment of the 1890 Miss. Constitution, Section 212. The amount of this Chickasaw Cession school money appropriated by the legislature annually is $62,191. (See Chapter 87 of the 1984 Laws). This amount if dispursed in equal payments on May 1 and November 1. The above amount represents approximately 36¢ per acre per year paid to the counties in lieu of possible returns that could be realized if the sixteenth sections in the Chickasaw District were still available for the utilization of township schools.

FINDINGS

For the 1983 fiscal year, sixteenth section school districts received revenues totaling $27,811,603. Chickasaw Cession schools received their annual interest payment from the state of $62,191. The revenues from sixteenth section lands have increased 467 percent during the past six years, from $4,923,381 in fiscal year 1977 to $27,811,603 in fiscal year 1983. Annual proceeds to the Chickasaw schools have remained unchanged during the period at $62,191. Indeed, this level has not changed since 1922.

The discrepancy between the receipts for the two areas can be graphically documented in a comparison of receipts from adjoining counties. The average per acre receipts for

fiscal years 1982 and 1983 for Lafayette (Chickasaw Cession) and Grenada (Sixteenth Section) counties were 36¢ and $9.06 respectively; for Monroe (Chickasaw Cession) and Lowndes (Sixteenth Section) counties, 36¢ and $41.83; and for Tunica (Chickasaw Cession) and Coahoma (Sixteenth Section) counties, 36¢ and $44.20.

Review of the per student implications of this contract offers an even greater discrepancy. Per student receipts for Lafayette, Monroe , and Tunica counties were 97¢, 38¢, and $1.36. These compared with adjoining Grenada, Lowndes, and Coahoma counties' per student receipts of $21.65, $39.22, and $76.36.

On a per acre basis, the sixteenth section counties averaged $42.00 per acre in fiscal year 1983, while the Chickasaw Cession counties average remained at its constant 36¢ per acre. The per student implication is just as dramatic with the sixteenth section counties averaging $75.34 per student, while the Chickasaw Cession districts only average 63¢ per student; Lee and Desoto counties, with larger student populations, average only 26¢ and 27¢ respectively.

The average county school district received $172,856 in sixteenth section money, while the average municipal school district received $101,068 in sixteenth section money. The entire $62,191 Chickasaw interest payment went to 23 county schools for an average of $2,704.

If a similar level of support were available to the Chickasaw Cession counties as were available to the *average* sixteenth section area counties, over $7,000,000 in additional funding would be needed. Raising the per acre proceeds to the sixteenth section per acre average of $42.00 would cost $7,022,502. Employing a similar methodology to the per student shortfall would cost $7,408,468.

CONCERNS

It has come to the attention of the State Auditor's office that the Chickasaw Cession school districts as a whole are financially unsound and, as a result, have resorted to doing any and all things necessary to provide quality public education in their districts, sometimes making *technical* violations of state accounting and budgeting laws. Examples of these technical violations include:

1. Utilizing restricted revenues for purposes not authorized by statute, but which benefit the school district.
2. Borrowing in anticipation of taxes and being unable to repay the entire amount by March 15 as set out by statute.
3. Utilizing current year tax monies to pay prior year claims, a practice not authorized by statute.

If these technical violations were ordered corrected, many of the Chickasaw Cession school districts would be unable to continue viable operations. It has put the State Auditor in a position of enforcing the law and closing public education in some school districts or allowing these technical violation to continue. Neither solution is acceptable.

RECOMMENDATIONS

Our offices strongly recommend that the Mississippi Legislature study the growing Chickasaw Cession school district financial problems and seek to provide them with some form of financial relief.

SCHOOL LAND INCOME

FISCAL YEARS	CHICKASAW AREA		CHOCTAW AREA	
	Total	Per Acre	Total	Per Acre
1976–1977	$62,191	$.3683	$ 4,923,381	$ 7.44
1977–1978	62,191	.3683	8,701,298	13.14
1978–1979	62,191	.3683	10,846,845	16.38
1979–1980	62,191	.3683	9,853,598	14.88
1980–1981	62,191	.3683	8,180,400	12.36
1981–1982	62,191	.3683	30,935,874	46.72
1982–1983	62,191	.3683	27,811,603	42.01

SOURCE: Office of Secretary of State, 1984

COMPARISON OF SCHOOL LAND INCOME SELECTED COUNTIES, FY 1981 and FY 1982

	FY 1981 – 1982		
	Total	Per Acre	Per Student
Monroe	$ 2,516	$ .36	$ .38
Lowndes	684,945	70.01	66.53
Lafayette	4,421	.36	.97
Grenada	112,390	11.72	27.48
Tunica	2,851	.36	.97
Coahoma	484,250	41.57	71.55

NOTE: Per Student Data Developed By Applying Student Data Available From SDE.
SOURCE: Office of Secretary of State, 1984

COMPARISON OF SCHOOL LAND INCOME SELECTED COUNTIES, FY 1982 and FY 1983

	FY 1982 - 1983		
	Total	Per Acre	Per Student
Monroe	$ 2,516	$ .36	$ .38
Lowndes	133,561	13.65	12.63
Lafayette	4,421	.36	.97
Grenada	61,278	6.39	15.59
Tunica	2,851	.36	1.37
Coahoma	545,344	46.82	81.20

NOTE: Per Student Data Developed By Applying Student Data Available From SDE.
SOURCE: Office of Secretary of State, 1984

COMPARISON OF SCHOOL LAND INCOME SELECTED COUNTIES, FY 1982 and FY 1983 TWO-YEAR AVERAGE 1981 - 1982, 1982 - 1983

	Two Year Average 1981 - 1982, 1982 - 1983		
	Total	Per Acre	Per Student
Monroe	$ 2,516	$ .36	$ .38
Lowndes	409,253	41.83	39.22
Lafayette	4,421	.36	.97
Grenada	86,834	9.06	21.65
Tunica	2,851	.36	1.36
Coahoma	514,797	44.20	76.36

NOTE: Per Student Data Developed By Applying Student Data Available From SDE.
SOURCE: Office of Secretary of State, 1984

ESTIMATED 1984 CHICKASAW REVENUE SHORTFALL

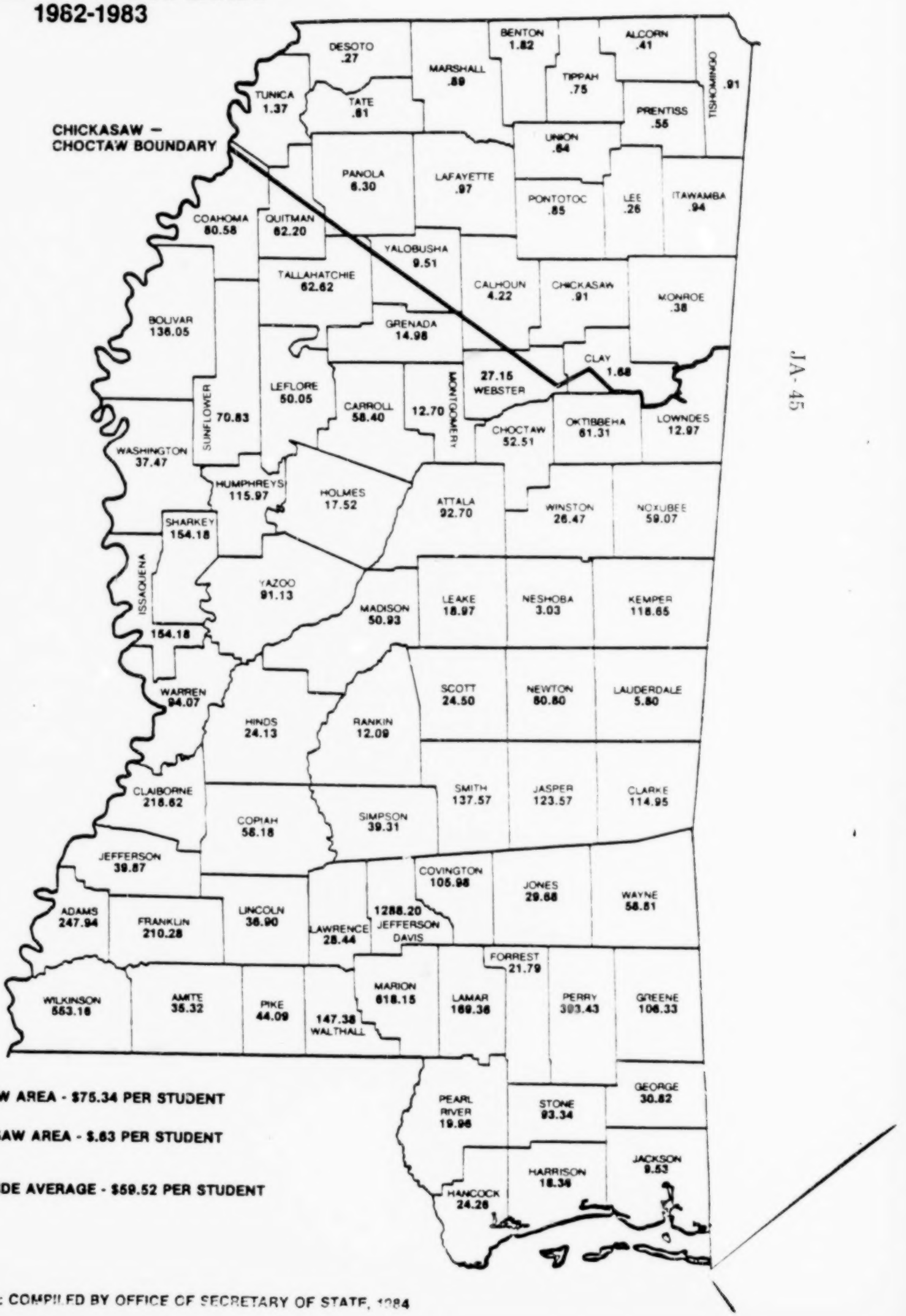
	CHICKASAW AREA	CHOCTAW AREA
1982-1983 Revenues Per Student	$.63	$75.34
1982-1983 Revenues Per Acre	.36	42.00
Shortage On Per Student Basis		- $74.71
Shortage On Per Acre Basis		- $41.64
PER STUDENT $74.71 X 99,163* =		- $7,408,468
PER ACRE $41.64 X 168,648 Acres** =		- $7,022,502

*Estimate of Students Attending Public Schools In Chickasaw Session Area

**Lieu Land Acres In Chickasaw Session Area

SOURCE: Office of Secretary of State, 1984

REVENUE($) PER STUDENT
MISSISSIPPI SCHOOL LANDS
1962-1983



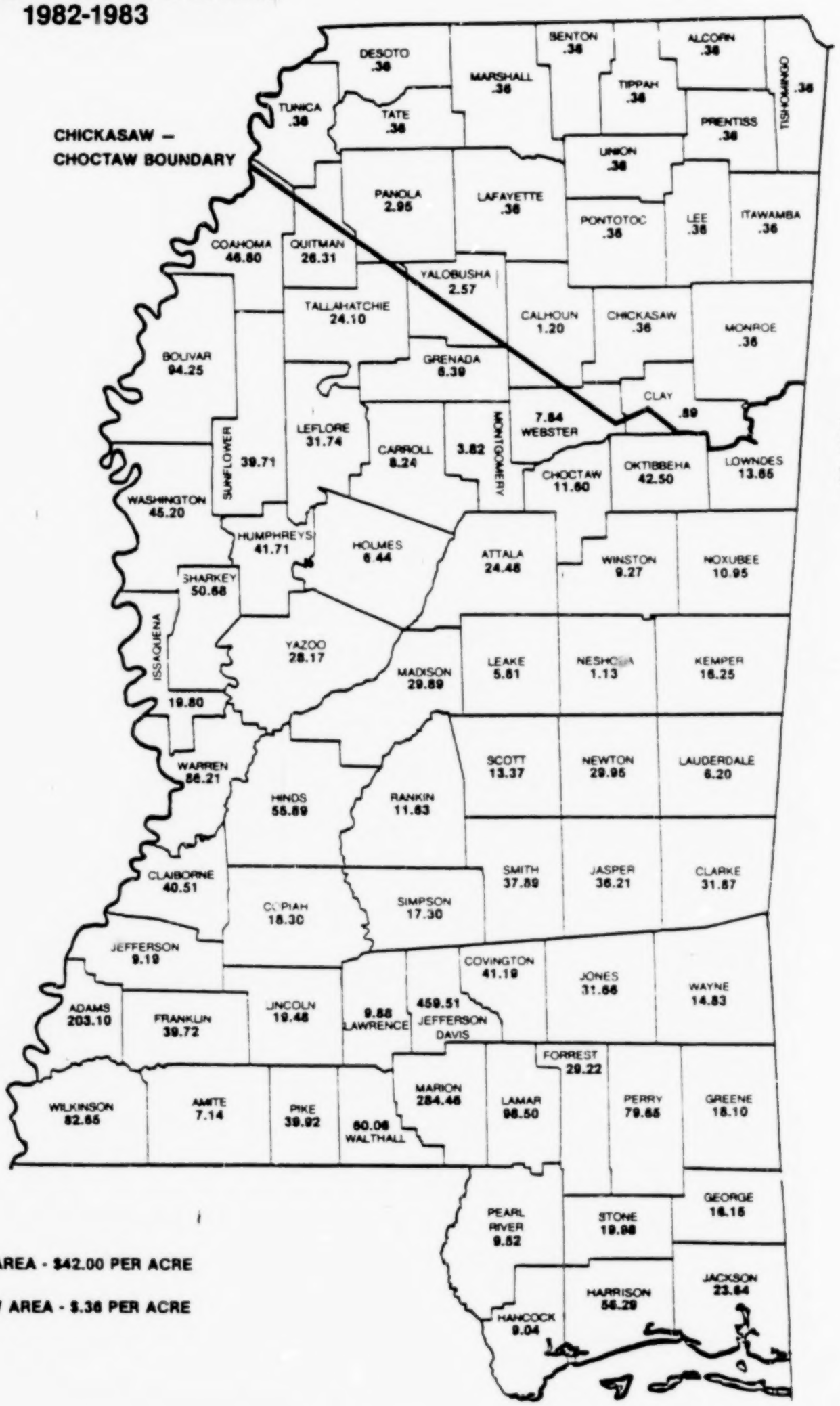
CHOCTAW AREA - $75.34 PER STUDENT

CHICKASAW AREA - $.83 PER STUDENT

STATEWIDE AVERAGE - $59.52 PER STUDENT

SOURCE: COMPILED BY OFFICE OF SECRETARY OF STATE, 1984

REVENUE($) PER ACRE OF MISSISSIPPI SCHOOL LANDS 1982-1983



CHOCTAW AREA - $42.00 PER ACRE

CHICKASAW AREA - $.36 PER ACRE

SOURCE: COMPILED BY OFFICE OF SECRETARY OF STATE, 1984

II: TREATIES OR ACTS OF CESSION

Georgia Cession

V The Territorial Papers Of The United States: The Territory of Mississippi, 1798-1817 at 142 (1937) (footnotes omitted).

Articles of Agreement and Cession entered into on the twenty fourth day of April One thousand eight hundred and two between the Commissioners appointed on the Part of the United States by virtue of an Act entitled "An Act for an amicable Settlement of Limits with the State of Georgia, and authorizing the Establishment of a Government in the Mississippi Territory," *and of the Act supplemental to the last mentioned Act,, on the one Part; and the Commissioners appointed on the Part of the State of Georgia by virtue of an Act entitled* "An Act to carry the twenty third Section of the first article of the Constitutioninto effect," *and of the Act to amend the last mentioned Act, on the other Part.*

ARTICLE 1st

The State of Georgia cedes to the United States all the Right, Title, and Claim, which the said State has to the Jurisdiction and Soil of the Lands situated within the Boundaries of the United States, South of the State of Tennessee and West of a Line beginning on the western Bank of the Chatahochie River, where the same crosses the boundary Line between the United States and Spain; running thence up the said River Chatahochie and along the western Bank thereof to the great Bend thereof next above the Place where a certain Creek or River called Uchee (being the first considerable Stream, on the western side, above the Cussetas and Coweta Towns) empties into the said Chatahochie River; thence in a direct Line to Nickajack on the Tennessee River; then crossing the said

last mentioned River, and thence running up the said Tennessee River and along the western Bank thereof to the southern boundary Line of the State of Tennessee: upon the following express conditions, and subject thereto, that is to say;

First, - That out out of the first nett Proceeds of the Sales of the Lands thus ceded, . . . the United States shall pay, at their Treasury, One million two hundred and fifty thousand Dollars, to the State of Georgia . . . and that, for the better securing as prompt a Payment of the said sum as is practicable, a *LAND OFFICE*, for the disposition of the vacant Lands thus ceded to which the indian Title has been or may hereafter be extinguished, shall be opened. . .
***

Fifthly, - That the Territory thus ceded shall form a State, and be admitted as such into the Union, as soon as it shall contain sixty thousand free Inhabitants, or at an earlier period if Congress shall think it expedient, on the same conditions and Restrictions, with the same Priveleges, and in the same manner as is provided in the Ordinance of Congress of the thirteenth day of July one thousand seven hundred and eighty seven for the Government of the Western Territory of the United States; which Ordinance shall, in all it's Parts, extend to the Territory contained in the present Act of Session, that article only excepted which forbids Slavery.
***

III: ACTS OF CONGRESS

1785 Northwest Ordinance - Land Sales
XXVIII Journals Of The Continental Congress 298 (1933).

An Ordinance for ascertaining the Mode of disposing of Lands in the Western Territory.

Be it ordained by the United States in Congress assembled, That the territory ceded by individual states to the United States, which has been purchased of the Indian inhabitants, shall be disposed of in the following manner:
***

The surveyors shall proceed to divide the said territory into townships of seven miles square, by lines running due north and south, and other crossing these at right angles. . .
***

The plats of the township respectively, shall be marked by subdivisions into sections of 1 mile square, or 640 acres, in the same direction as the external lines, and numbered from 1 to 49. Always beginning the succeeding range of the sections with the number next to that which the preceding one concluded. . . And these sections shall be subdivided into lots of 320 acres.
***

The board of treasury shall transmit duplicates of the said original plats so drawn for, to the commissioners of the loan-offices of the several states, who, after giving notice of not less than two nor more than six months, by causing advertisements to be posted up at the courthouses, or other noted places in every county, and to be inserted

in one news-paper published in the states of their residence respectively, shall proceed to sell the townships or fractional parts at public vendue; . . .
***

There shall be reserved the central section of every township, for the maintenance of public schools within the said township. . . .
***

Ohio Enabling Act
2 Stat. 173 ch. XL (1802).

An Act to enable the people of the Eastern division of the territory northwest of the river Ohio to form a constitution and a state government, and for the admission of such state into the Union, on an equal footing with the original States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of the eastern division of the territory northwest of the river Ohio, be, and they are hereby authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper, and the said state, when formed, shall be admitted into the Union, upon the same footing with the original states, in all respects whatever.
***

SEC.5. *And be it further enacted,* That the members of the convention, thus duly elected, be, and they are hereby authorized to meet at Chilicothe on the first Monday in November next; which convention, when met, shall first determine by a majority of the whole number elected, whether it be or be not expedient at that time to form a constitution and state government for the people, within the said territory, and if it be determined to be expedient, the convention shall be, and hereby are authorized to form a constitution and state government, or if it be deemed more expedient, the said convention shall provide by ordinance for electing representatives to form a constitution or frame of government; which said representatives shall be chosen in such manner, and in such proportion, and shall meet at such time and place, as shall be prescribed by the said ordinance; and shall form for the people of the said state, a constitution and state government; provided the same shall be republican, and not repugnant to the ordinance of the thirteenth of July, one thousand seven

hundred and eighty-seven, between the original states and the people and states of the territory northwest of the river Ohio.
***

SEC.7. *And be it further enacted*, That the following propositions be, and the same are hereby offered to the convention of the eastern state of the said territory, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States.

First, That the section, number sixteen, in every township, and where such section has been sold, granted or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools.
***

Provided always, that the three foregoing Propositions herein offered, [including the sixteenth sections] are on the conditions that the convention of the said state shall provide by an ordinance irrevocable, without the consent of the United States, that every and each tract of land sold by Congress, from and after the thirtieth day of June next, shall be and remain exempt from any tax laid by order or under authority of the state, whether for state, county, township or any other purpose whatever, for the term of five years from and after the day of sale.
***

APPROVED, April 30, 1802.

Amendment to the Ohio Enabling Act
2 Stat. 225 ch. XXI (1803).

An Act in addition to, and in modification of, the propositions contained in the act intituled "An act to enable the people of the Eastern division of the territory northwest of the river Ohio, to form a Constitution and state government, and for the admission of such state into the Union, on an equal footing with the original States, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following several tracts of land in the state of Ohio, be, and the same are hereby appropriated for the use of schools in that state, and shall, together with all the tracts of land heretofore appropriated for that purpose, be vested in the legislature of that state, in trust for the use aforesaid, and for no other use, intent or purpose whatever, that is to say:
***

Fourthly - One thirty-sixth part of all the lands of the United States lying in the state of Ohio, to which the Indian title has not been extinguished; which may hereafter be purchased of the Indian tribes by the United States, which thirty-sixth part shall consist of the section No. sixteen, in each township, if the said lands shall be surveyed in townships of six miles square, and shall, if the lands be surveyed in a different manner, be designated by lots.
***

APPROVED, March 3, 1803.

1803 Land Sales Act for Mississippi
2 Stat. 229 ch. XXVII (1803).

An Act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee.(a)

Be it enacted by the Senate and the House of Representatives of the United States in Congress assembled, That any person or persons, . . . who were resident in the Mississippi territory on the twenty-seventh day of October, in the year one thousand seven hundred and ninety-five, and who had prior to that day obtained, either from the British government of West Florida or from the Spanish government, any warrant or order of survey for lands lying within the said territory, to which the Indian title had been extinguished, . . . shall be confirmed in their claims to such lands. . . .

***

SEC.6. *And be it further enacted,* That the register of the land-office in Adams county, and two other persons who shall be appointed by the President of the United States alone, shall . . . . be commissioners, for the purpose of ascertaining the rights of persons . . .; and, when it shall appear to them that the claimant is entitled to a tract of land . . . in virtue of a British or Spanish grant legally and fully executed, they shall give a certificate thereof. . . .

***

SEC.11. *And be it further enacted,* That the lands for which certificates shall have been granted by the commissioners in pursuance of the provisions of this act, shall, as soon as may be, be surveyed under the direction of the surveyor of the lands of the United States above mentioned, in conformity to the true tenor and intent of such certificates; and the said surveyor shall also cause all the other lands of the United States, in the Mississippi territory, to which the Indian title has been extinguished, to

be surveyed as far as practicable, into townships, and subdivided into half sections, in the manner provided for the surveying of the lands of the United States, situate northwest of the river Ohio, and above the mouth of the Kentucky river, and shall transmit to the registers of the land-offices respectively, general and particular plots of all the lands surveyed as aforesaid, and shall also forward copies of the said plots to the Secretary of the Treasury;. . .

SEC.12. *And be it further enacted,* That all the lands aforesaid, not otherwise disposed of, or excepted by virtue of the preceding sections of this act, shall, with the exception of the section number sixteen, which shall be reserved in each township for the support of schools within the same, . . . be offered for sale to the highest bidder, under the direction of the governor of the Mississippi territory, of the surveyor of the lands of the United States, above mentioned, and of the register of the land-office at the places respectively, where the land-offices are kept, and on such day or days as shall, by a public proclamation of the President of the United States, designated for that purpose. The sales shall remain open at each place for three weeks and no longer; and all lands, other than the section number sixteen, remaining unsold at the closing of the public sales, may be disposed of at private sale by the registers of the respective land-offices in the same manner, under the same regulations, for the same price, and on the same terms and conditions as is provided by law, for the sale of the lands of the United States, north of the river Ohio, by an act, intituled "An act to amend the act intituled, An act providing for the sale of the lands of the United States in the territory northwest of the Ohio, and above the mouth of Kentucky river.". . .

***

APPROVED, March 3, 1803.

Mississippi Enabling Act
3 Stat. 348 ch. XXIII (1817).

Chap. XXIII.—*An Act to enable the people of the western part of the Mississippi territory to form a constitution and state government, and for the admission of such state into the union, on an equal footing with the original states.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the inhabitants of the western part of the Mississippi territory be, and they hereby are, authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper; and the said state, when formed, shall be admitted to the union upon the same footing with the original states, in all respects whatever.

***

SEC.4. *And be it further enacted,* That the members of the convention, thus duly elected, be, and they hereby are authorized to meet at the town of Washington, on the first Monday in July next: which convention, when met, shall first determine, by a majority of the whole number elected; whether it be or be not expedient, at that time, to form a constitution and state government for the people within the said territory; and if it be determined to be expedient, the convention shall be, and hereby are, authorized to form a consitution and state government: *Provided,* That the same, when formed, shall be republican, and not repugnant to the principles of the ordinance of the thirteenth of July, one thousand seven hundred and eighty-seven, between the people and states of the territory north-west of the river Ohio, so far as the same has been extended to the said territory by the articles of agreement between the United States and the state of Georgia, or of the constitution of the United States: *And provided also,* That the said convention shall provide, by an ordinance irrevocable without the consent of the United States, that the people

inhabiting the said territory do agree and declare that they for ever disclaim all right or title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States; and moreover, that each and every tract of land sold by Congress, shall be and remain exempt from any tax laid by the order, or under the authority, of the state, whether for state, county, township, parish or any other purpose whatever, for the term of five years, from and after the respective days of the sales thereof, and that the lands belonging to citizens of the United States, residing without the said state, shall never be taxed higher than the lands belonging to persons residing therein; and that no taxes shall be imposed on lands the property of the United States, and that the river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of the said state, as to other citiens of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said state.

SEC.5. *And be it further enacted,* That five per cent. of the net proceeds of the lands lying within the said territory, and which shall be sold by Congress from and after the first day of December next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals; of which three-fifths shall be applied to those objects within the said state, under the direction of the legislature thereof, and two-fifths to the making of a road or roads leading to the said state, under the direction of Congress: *Provided,* That the application of such proceeds shall not be made until after payment is completed of the one million two hundred and fifty thousand dollars due to the state of Georgia, in consideration of the cession to the United States, nor until the payment of all the stock which has been or shall be created by the act, entitled "An act providing for the indemnification of certain claimants of public lands in the Mississippi territory," shall be completed: *And provided also,* That the

said five per cent. shall not be calculated on any part of such proceeds as shall be applied to the payment of the one million two hundred and fifty thousand dollars due to the state of Georgia, in consideration of the cession to the United States, or in payment of the stock which has or shall be created by the act, entitled "An act providing for the indemnification of certain claimants of public lands in the Mississippi territory."

***

APPROVED, March 1, 1817.

1817 Land Sales Act for Mississippi
3 Stat. 375 ch. LXII (1817).

An Act to authorize the appointment of a surveyor for the lands in the northern part of the Mississippi territory, and the sale of certain lands therein described.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That a surveyor of the lands of the United States in the Mississippi territory, lying north of an east and west line, to be drawn from the river Mississippi, through fort Williams, to the western boundary line of the state of Georgia, shall be appointed, whose duty it shall be to engage a sufficient number of skilful surveyors as his deputies, and to cause the lands above mentioned, which have not already been surveyed, and to which the Indian title has been extinguished, to be surveyed and divided in the manner provided by law for the surveying of the other public lands of the United States in the Mississippi territory, to do and perform all such acts in relation to the said lands, to transmit plats of survey in the manner, and to fix the compensation of the deputy surveyor, chain-carriers, and axe-men, under the same restrictions and limitations of expense in surveying, as is by law directed and provided for the regulation of the powers and duties of the surveyor of the lands south of the state of Tennessee, in relation to the other public lands in the Mississippi territory. And the said surveyor, appointed in pursuance of this act, shall be entitled to receive, for his services, one thousand five hundred dollars, as an annual compensation.

SEC.2. *And be it further enacted,* That all the lands of the United States in the Mississippi territory, to which the Indian title has been extinguished, lying north of the aforesaid east and west line, and which has not heretofore been offered for sale, shall be attached to, and made a part of, the land district of Madison, in the said territory.

SEC.3. *And be it further enacted,* That all the lands, by this act attached to the district of Madison, after having

been surveyed according to law, shall, with the exception of the section No. 16, in each township, which shall be reserved for the support of schools therein, and with the further exception of such sections, not exceeding ten in number, as the President shall designate, for the purpose of laying out and establishing towns thereon, be offered for sale to the highest bidder, under the direction of the register of the land office, and the receiver of public moneys, at the place where the land office is kept, and on such day, or days, as shall, by proclamation of the President of the United States, be designated for that purpose; the sales shall remain open two weeks, and no longer. . . .

APPROVED, March 3, 1817.

Chickasaw Lieu Lands Act
5 Stat. 116 ch. CCCLV (1836).

An Act to carry into effect, in the States of Alabama and Mississippi, the extisting compacts with those States in regard to the five per cent. fund, and the school reservations.

***

SEC.2. *And be it further enacted,* That there shall be reserved from sale, in the State of Mississippi, a quantity of land, equal to one-thirty-sixth part of the lands ceded by said Chickasaws as aforesaid, within said State of Mississippi, which land shall be selected under the direction of the Secretary of the Treasury, in sections, or half sections, or quarter sections, out of any public land remaining unsold, that shall have been offered at public sale within either of the land districts in said State of Mississippi, contiguous to said lands within said State, so ceded by the Chickasaws as aforesaid; which lands, when so selected as aforesaid, the same shall vest in the State of Mississippi, for the use of schools within said territory in said State, so ceded as aforesaid by the Chickasaws; and said lands, thus selected, shall be holden by the same tenure, and upon the same terms and conditions, in all respects, as the said State now holds the lands heretofore reserved for the use of schools in said State.

***

APPROVED, July 4, 1836.

Amendment to Chickasaw Lieu Lands Act
5 Stat. 490 ch. XL (1842).

An Act to amend an act entitled "An act to carry into effect, in the State of Alabama and Mississippi, the existing compacts with those States with regard to the five per cent. fund and the school reservations."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the second section of the act entitled "An act to carry into effect, in the States of Alabama and Mississippi, the existing compacts with those States with regard to the five per cent. fund and the school reservations." as requires the land therein designated as reserved to the State of Mississippi for the use of schools to be selected, under the direction of the Secretary of the Treasury, "out of any public lands, remaining unsold, that shall have been offered at public sale within either of the land districts in said State of Mississippi, contiguous to said lands, within said State," ceded by the Chickasaws, be so amended that the said lands may be selected, under the direction of the Governor of said State of Mississippi, out of any public lands remaining unsold within either of the land districts in said State of Mississippi, contiguous to the lands in said State, ceded by the Chickasaw Indiands.

APPROVED, June 13, 1842.

Authorization of Sale of Lieu Lands
10 Stat. 6 ch. XXXV (1852).

Chap.XXXV. - *An Act to authorize the Legislature of the State of Mississippi to sell the Lands heretofore appropriated for the Use of Schools in that State, and to ratify and approve the Sales already made.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Legislature of the State of Mississippi shall be, and is hereby authorized to sell and convey in fee-simple, or lease, for a term of years, as the said legislature may deem best, all or any part of the lands heretofore reserved and appropriated by Congress for the use of schools within said State, and to invest the money arising from said sales, as said legislature may direct, for the use and support of schools within the several townships and districts of country for which they were originally reserved and set apart, and for no other use, or purpose whatsoever: *Provided*, Said lands or any part thereof, shall, in no case be sold or leased without the consent of the inhabitants of such township or district to be obtained in such manner as the legislature of said State may by law direct: *And provided further*, That in all cases, the money arising from the sales of lands within a particular township and district, shall be appropriated to the use of schools within that township and district.

SEC.2. *And be it further enacted*, That sales heretofore made by the authority of the Legislature of the State of Mississippi of lands reserved and appropriated as aforesaid, are hereby ratified and approved in the same manner and to the same extent, as if this act had been in force at the time of said sales.

APPROVED, May 19, 1852.

IV: MISSISSIPPI CONSTITUTIONAL PROVISIONS

Mississippi Constitution, art. VI, § 20 (1817).

That the general assembly shall take measures to preserve from unnecessary waste or damage such lands as are or may hereafter be granted by the United States for the use of schools, within each township in this State, and apply the funds which may be raised from such lands, by rent or lease, in strict conformity to the object of such grant; but no lands granted for the use of such township schools shall ever be sold by any authority in this State.

Mississippi Constitution, art. IV, § 104 (1890).

Statutes of limitations in civil causes shall not run against the state, or any subdivision or municipal corporation thereof.

Mississippi Constitution, art. VIII, § 212 (1890).

The rate of interest on the fund known as the Chickasaw school fund, and other trust funds for educational purposes, for which the State is responsible, shall be fixed and remain as long as said funds are held by the State, at six per centum per annum, from and after the close of the fiscal year A. D., 1891, and the distribution of said interest shall be made semi-annually on the first of May and November of each year.

V: ACTS OF MISSISSIPPI LEGISLATURE: CODE PROVISIONS

Miss. Code Ann. § 11-46-5 (4) (Supp.1985).

Waiver of immunity; course and scope of employment; presumptions.

***

(4) Nothing contained in this chapter shall be construed to waive the immunity of the state from suit in federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.

Miss. Code Ann. § 15-1-7 (1972).

Limitations applicable to actions to recover land.

A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to some person through whom he claims, or, if the right shall not have accrued to any person through whom he claims, then except within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to the person making or bringing the same. However, if, at the time at which the right of any person to make an entry or to bring an action to recover land shall have first accrued, such person shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of ten years hereinbefore limited shall have expired, make an entry or bring an action to recover the land at any time within ten years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened. However, when any person who shall be under either of the disabilities mentioned, at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed, by reason of the disability of any other person, to make an entry or to bring an action to recover the land beyond the period of ten years next after the time at which such person shall have died.

Miss. Code Ann. § 15-1-9 (1972).

Limitations applicable to suits in equity to recover land.

A person claiming land in equity may not bring suit to recover the same except within the period during which, by virtue of section 15-1-7, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such an estate, interest, or right in or to the same as he shall claim therein in equity. However, in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered.

Miss. Code Ann. § 15-1-39 (1972).

Limitations applicable to actions involving certain trusts.

Bills for relief, in case of the existence of a trust not cognizable by the courts of common law and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue and not after, saving, however, to all persons under disability of infancy or unsoundness of mind, the like period of time after such disability shall be removed. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years.

Miss. Code Ann. § 15-1-53 (1972).

Effect of running of statute of limitations against executor, administrator, guardian, or other trustee, as against beneficiary.

When the legal right to property or a right in action is in an executor, administrator, guardian, or other trustee, the time during which any statute of limitations runs against such trustee shall be computed against the person beneficially interested in such property or right in action, although such person may be under disability and within the saving of any statute of limitations; and may be availed of in any suit or actions by such person.

Miss. Code Ann. § 29-3-1 (Supp.1985).

Board of education to have control - management of lands and funds as trust property - disapproval by board of supervisors of rental value of lands - definitions.

(1) Sixteenth section school lands, or lands granted in lieu thereof, constitute property held in trust for the benefit of the public schools and must be treated as such. The board of education under the general supervision of the state land commissioner, shall have control and jurisdiction of said school trust lands and of all funds arising from any disposition thereof heretofore or hereafter made. It shall be the duty of the board of education to manage the school trust lands and all funds arising therefrom as trust property. Accordingly, the board shall assure that adequate compensation is received for all uses of the trust lands, except for uses by the public schools.

* * *

Miss. Code Ann. § 29-3-17 (Supp.1985).

Lieu lands commission.

A commission is hereby established to be known as the lieu land commission, hereinafter referred to as the commission, and such commission shall consist of the attorney general, who shall be ex officio chairman, the secretary of state and the state land commissioner, who shall be ex officio secretary. Said lieu land commission shall have authority to sell all lands granted in lieu of sixteenth section land and located out of the county owning such land situated in the State of Mississippi. From and after July 1, 1981, said lieu land commission shall proceed to sell all such lands granted in lieu of sixteenth section land and located out of the county owning such land situated in the State of Mississippi.

Miss. Code Ann. § 29-3-57 (Supp.1985)

Superintendent of education to docket leases and collect rentals.

The superintendent of education shall keep a current docket as to the expiration date of all leases on sixteenth section lands; likewise, he shall keep a correct current docket upon the existing leases or any extensions thereof as to the amounts and time of payment of rentals provided for by such lease. It shall be the duty of the superintendent of education to collect promptly all rentals due and all principal and interest due upon loans and investments of sixteenth section funds. Upon a sixty (60) day default in payment of any rentals according to the terms of such lease, the lease shall be declared terminated unless the board of education finds extenuating circumstances were present, and the board shall inaugurate the proper legal proceedings to terminate such lease. The superintendent of education, with the approval of the board of education, may employ an attorney or other person to aid in collecting any such funds when in his opinion the same is necessary,

and may pay reasonable compensation therefor out of funds collected, not to exceed in any case twenty-five per cent (25%) of the amount actually collected. It shall be the duty of the superintendent of education to supervise generally the administration of all sixteenth section lands within his jurisdiction. In all cases where leases of sixteenth section lands are entered into, it shall be the duty of the superintendent of education to take the notes of the lessees for the rents provided by said lease and turn them over to the county depository and attend to their collection. In the case of the leasing of agricultural lands, the school district shall have the same rights and remedies for the security and collection of such rent as are given by law to agricultural landlords.

Miss. Code Ann. § 29-3-59 (Supp.1985).

Proceeds of leases.

All rentals, or other revenue payable under any leases executed pursuant to this chapter shall be paid to and collected by the superintendent of education and shall be credited to the township school fund and used and expended in the same manner and subject to the same restrictions as provided by law in the case of other money belonging to such funds. Any superintendent of education receiving any such revenue shall make annual report thereof to the state superintendent of education.

Miss. Code Ann. § 29-3-109 (Supp.1985).

Crediting of funds derived from lands.

All expendable funds derived from sixteenth section or lieu lands shall be credited to the school district of the township in which such sixteenth section lands may be located, or to which any sixteenth section lieu lands may belong. Such funds shall not be expended except for the purpose of education of the educable children of the school district to which they belong, or as otherwise may be provided by law.

The board of education shall require additional securities from the county depository when necessary to protect such funds and, in the event of their failure so to do, they shall be liable therefor upon their official bond.

Miss. Code Ann. § 29-3-111 (Supp.1985).

Expenditure of moneys derived from lands.

All moneys heretofore or hereafter derived from the leasing of said lands for oil, gas and mineral purposes, including any bonus or delay rental payable under such leases, and all moneys derived from the annual payment of rents from the leasing of said lands for agricultural, residential, commericial, industrial, grazing or other purposes, or derived as interest upon loans or investments of principal funds, and all moneys heretofore or hereafter derived from the sale of timber, may be expended for any of the purposes authorized by law. In cases where said moneys have been transferred to the principal fund and it is determined to expend same for any of the purposes authorized by law, such moneys shall be transferred to the proper fund for expenditure upon order of the board of education.

Miss. Code Ann. § 29-3-113.

Investment and lending of funds.

The principal fund shall be a permanent fund which shall consist of funds heretofore or hereafter derived from certain uses or for certain resources of school trust lands which shall be invested and, except as otherwise provided in this section, only the interest and income derived from such funds shall be expendable by the school district.

The principal fund shall consist of:

(a) Funds received for easements and rights-of-way pursuant to section 29-3-91;

(b) Funds received for sales of lieu land pursuant to sections 29-3-15 through 29-3-25;

(c) Funds received from any permanent damage to the school trust land;

(d) Funds received from the sale of nonrenewable resources but not limited to thc sale of sand, gravel, dirt, clays and royalties received from the sale of mineral ores, coal, oil and gas.

(e) Funds received from the sale of buildings pursuant to section 29-3-77.

(f) Funds received from the sale of timber.

It shall be the duty of the board of education to keep the principal fund invested in any direct obligation issued by or guaranteed in full as to principal and interest by the United States of America or in certificates of deposit issued by a qualified depository of the State of Mississippi as approved by the state depository commission. The certificates of deposit may bear interest at any rate per annum which may be mutually agreed upon but in no case shall said rate be less than that paid on passbook savings.

The board of education is likewise authorized to invest said funds in interest bearing deposits or other obligations

of financial institutions in which, and to the same extent as, the state depository commission is authorized to invest excess state funds under and by virtue of the provisions of section 27-105-33. as the same now is or may hereafter be amended, except that one hundred percent (100%) of said funds are hereby authorized to be so invested. For the purposes of investment, the principal fund of each township may be combined into one (1) or more district accounts; however, the docket book of the county superintendent shall at all times reflect the proper source of such funds. Provided that funds received from the sale of timber shall be placed in a separate principal fund account, and may be expended for any of the purposes authorized by law.

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Miss. Code Ann. § 29-3-115 (Supp.1985).

Use of expendable funds.

The expendable funds derived from sixteenth section or lieu lands may be expended for the building and repair of schoolhouses, teachers' homes, and other school facilities, the purchase of furniture, school vehicles and equipment for same, the payment of teachers' salaries, and for all other purposes in operating and maintaining the schools of the district to which such funds belong for which other available school funds may be expended. Such funds may also be expended for clearing, draining, reforesting and otherwise improving any sixteenth section lands of township to which any such available funds may belong. Such funds may also be expended for the purpose of paying any drainage district taxes, costs, expenses, and assessments for which sixteenth section may be liable, and in such case the same shall be paid by the board of education out of any funds which would otherwise be paid over to the school district entitled thereto under the provisions of sections 29-3-115 through 29-3-123. Such funds may also be expended to pay all reasonable and necessary attorneys' fees incurred to clear the title on any sixteenth section lieu lands located outside the county.

VI: ACTS OF MISSISSIPPI LEGISLATURE: STATUTES AT LARGE

1844 Miss. Laws 238 ch. LXVIII.

AN ACT to secure to the Chickasaw counties the benefit of the lands given to the State in lieu of the Sixteenth Section, in the Chickasaw Nation.

WHEREAS, on the fourth day of July, in the year one thousand eight hundred and thirty-six, the Congress of the United States passed an act to carry into effect, in the States of Alabama and Mississippi, the existing compacts with those States, in regard to the five per cent fund and the school reservations, under which act the Secretary of the Treasury caused certain lands to be selected for the use of schools in the Chickasaw cession: And whereas, on the thirteenth day of June, Anno Domini one thousand eight hundred and forty-two, an amendment to said act was passed by Congress, vesting in the Governor of the State of Mississippi the power of locating the said lands for the use of schools, in the Chickasaw Nation, in lieu of the sixteenth section, out of any public land remaining unsold within either of the land districts in said State of Mississippi, contiguous to the Chickasaw Indians—

SEC.1. *Be it enacted by the Legislature of the State of Mississippi*, That all the selections of lands, made by the Secretary of the Treasury, under the act of Congress, passed July fourth, one thousand eight hundred and thirty-six, be, and the same are hereby relinquished; and all selections made, or hereafter to be made by the Governor of the State of Mississippi, under the act of June thirteenth, Anno Domini one thousand eight hundred and forty-two, be, and the same are hereby received by the State of Mississippi, for the purpose specified in said act of June thirteenth, one thousand eight hundred and forty-two.

SEC.2. *Be it further enacted*, That it shall be the duty of the Governor to have filed in the office of the register of the land office, in the district in which the lands have been located, under the act of thirteenth of June, one thousand eight hundred and forty-two, a list of all locations, reported by the commissioners appointed to select lands under said act; and that hereafter, it shall be the duty of the commissioners, at least once in three months, to file, in the proper land office, a list of the locations made by them, until the full amount of lands shall be selected.

SEC.3. *Be it further enacted*, That each of the commissioners hereafter, shall be allowed to employ one assistant, at a price not to exceed thirty dollars per month; and the commissioner shall, as far as convenient, locate from separate, instead of joint examination, so as to complete the locations as soon as possible.

SEC.4. *And be it further enacted*, That this act shall take effect and be in force from and after its passage.

APPROVED February 13, 1844.

1848 Miss. Laws 62 ch. III.

AN ACT to provide for the leasing of the Chickasaw School Lands.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That for the disposal of lands ceded by act of Congress for the use of schools in the Chickasaw cession, in lieu of the sixteenth sections of said cession, approved September 4, 1841, there shall be a land office established in the city of Jackson, under the management and control of the Secretary of State, whose duty it shall be, so soon as may be practicable after the passage of this act, to provide the said land office with maps or plats of such lands as have been selected by the commissioners appointed by the Governor of this State for the purpose aforesaid, copies of which maps he shall furnish to the Auditor of public accounts, and keep the originals in said land office; and shall exhibit the same and furnish copies to any person or persons who may apply to him for the same, from whom the said Secretary of State may demand and receive a fee of fifty cents for each copy of a transcript or smaller quantity of land which he may furnish.

SEC.2. *Be it further enacted*, That it shall be the duty of the said Secretary of State, to offer the said lands at public auction to the highest bidder for lease for the term of ninety-nine years, and renewable to the lessee, his heirs or assigns forever, in the city of Jackson, in front of the State capitol, on the first Monday of December, 1848, in tracts of quarter sections, as the same may have been surveyed and sub-divided under the authority of the United States: *Provided*, he shall give six months previous notice of the time and place and terms of such sale by proclamation in three public newspapers printed in this State, and in one of the public newspapers printed in the city of Nashville, and in the Washington Union.

SEC.3. *Be it further enacted*, That the said sale of leases shall continue from day to day until the whole of said

lands shall be offered for sale; and all of said lands for lease remaining unsold at the close of said public auction, may be disposed of at private sale by said Secretary of State in the manner hereinafter prescribed: *Provided*, that no leases of lands shall be disposed of by virtue of this act either at public or private sale, for a less sum than six dollars per acre be paid in gold and silver.

SEC.4. *Be it further enacted*, That all payments for such lands shall be made to the Treasurer of this State upon the receipt warrant of the Auditor of public accounts, which said warrant the Auditor shall issue to such person or persons as shall deliver to him the certificate of the Secretary of State, certifying such person or persons have been the highest bidder at said public auction, or applicant at private sale of leases, as the case may be, and specifying the amount bid or due for the quarter section or fractional quarter section, as the case may be applied for; and upon payment being made to the Treasurer of the purchase money of said lease of said tract of land, it shall be his duty to give the purchaser or purchasers a receipt specifying the amount paid and the tract of land leased, and to record the same in a book to be kept by him for that purpose; upon which receipt, or a copy of the record thereof being presented to the Governor of this State, it shall be his duty to issue a patent of said lease to the purchaser or purchasers, which patent shall be signed by the Governor and countersigned by the Secretary of State, and the great seal of the State shall be annexed: *Provided*, the person or persons applying for the same shall first pay to the Secretary of State the sum of one dollar for every such patent.

SEC.5. *Be it further enacted*, That it shall be the duty of the Auditor of public accounts, to open an account between the State of Mississippi and the fund realised from the lease of said lands in a book to be kept by him for that purpose, in which he shall charge the State with the several amounts received on account of said lands, the whole amount of which, after deducting the expenses of said sale as well as expenses incurred by the State for

locating those lands, shall be a charge upon the State ofMississippi, to be held in trust by said State for the use of schools in the Chickasaw cession, and to be applied to that purpose as hereafter to be provided by law.

SEC.6. *Be it further enacted*, That after the said public lease of said land shall have closed, if any two or more persons shall apply to purchase the lease of the same quarter section or other tract of land on the same day and at one and the same time, it shall be the duty of the Secretary of State to reoffer the same to the highest bidder over six dollars per acre, among said applicants, and to give a certificate to said highest bidder, as in cases of public sale as hereinbefore provided.

SEC.7. *Be it further enacted*, That if any purchaser or purchasers at public sale shall fail to pay the purchase money before the land office is open the next day after said purhase, the said leases of land bid off by him or them shall be again offered at public auction by the Secretary of State, and the person or persons shall not be entitled to bid thereafter at said sale.

SEC.8. *Be it further enacted*, That the Auditor of public accounts shall receive twenty-five cents for each receipt warrant he shall issue; and the Secretary of State and Treasurer shall each receive twenty-five cents for each certificate or purchase they shall issue under the provisions of this act, from the person or persons in whose favor they are issued; and it shall be the duty of the Auditor of public accounts, upon the application of the Secretary of State, to issue his warrant upon the treasury of this State for an amount sufficient to defray the expenses incurred in carrying into effect the provisions of this act, which amount shall be charged by him to the Chickasaw school fund, and shall be paid out of any money in the treasury not otherwise appropriated.

SEC.9. *Be it further enacted*, That the advertisement authorized by this act, shall only define the county, township, and range in which said lands are situated, with the number of acres in each county, with a notice, that a list of each tract may be had by an application to the Secretary

of State, and that said list is posted up at the court-house of each county where said lands are situated, which list the Secretary of State shall cause to be made out and posted as above.

SEC.10. *Be it further enacted*, That said land office shall be open at 10 o'clock A.M., and closed at 3 o'clock P.M. of each and every day, Sundays excepted.

SEC.11. *Be it further enacted*, That L. L. Bridges, Jacob Magee, Daniel Connell, and Joshua L. Champion of Coahoma county, be authorised to enter, at the price of two dollars and fifty cents per acre, the several pre-emptions heretofore entered by them under the laws of the general government,viz: L. L. Bridges, the north-west quarter section 19, township 28, and range two west; Jacob Magee, the north-west quarter of section 23, township 30, in range three west; Daniel Connell, lots 9, 10, 15, and 16, section 23, township 30, range three; and J. L. Champion, the east half of the north-west quarter of section 26, township 29, range three west; which entries shall be made and governed by the same rules and regulations, and may enter the same at any time before the day appointed for the sale of the lands, as other entries.

SEC.12. *And be it further enacted*, That this act take effect and be in force from and after its passage.

APPROVED February 23, 1848.

1854 Miss. Laws 348 ch. CCXVII.

AN ACT supplemental to an act entitled an act to provide for the Leasing of the Chickasaw School Lands, approved February 23, 1848.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That so much of the above recited act as provides that the Chickasaw school lands shall be leased for the term of ninety-nine years, be and the same is hereby repealed, and that hereafter it shall be the duty of the Secretary of State, upon the application of any person or persons for the purchase of any such lands as are remaining unsold, to issue to such applicant, a certificate of entry, (instead of lease,) and upon payment being made by such applicant to the treasurer, of the purchase money, as is now provided, it shall be the duty of said treasurer, to give to the said purchaser or purchasers, a certificate therefor, and upon the production of said certificate of payment, or a copy of the record, as is now prescribed, to the Governor of this State, it shall be his duty to issue a patent, in fee simple, to the purchaser or purchasers, which patent shall be signed by the Governor, and counter-signed by the Secretary of State, and the great seal of the State shall be annexed.

SEC.2. *Be it further enacted*, That all lands heretofore leased under the provisions of the above recited act, shall be renewable to the lessee, his heirs or assigns, forever, without the payment on the part of said lessee, his heirs or assigns, or any other sum or sums than may be necessary as charges by the proper officers of this State, in compensation for services in renewing said lease, as is provided in the second section of said act.

SEC.3. *Be it further enacted*, That this act shall take effect and be in force from and after its passage.

APPROVED March 2, 1854.

1856 Miss. Laws 141 ch. LVI.

AN ACT to provide for the payment of interest on the Chickasaw School Fund, and for other purposes.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That hereafter it shall be the duty of the auditor of public accounts, on the first day of May and November of each year, to credit the Chickasaw school funds account which he was required to open between the State of Mississippi and the said fund, by virtue of the fifth section of an act of the legislature of the State, passed February 23, 1848, entitled "an act to provide for the leasure of the Chickasaw school lands," with interest at the rate of eight per cent. per annum, to-wit: on the first day of May, with interest for six months, on all moneys due said fund on the first day of November preceding; and on the first day of November, with interest for six months on all moneys due said fund on the first day of May preceding, which said interest shall be drawn from the treasurer in the manner hereinafter provided; but the principal sum of said fund, now in the treasurer, or which shall be hereafter received from the sale of said lands constituting said fund, shall become a charge on the State of Mississippi, and shall remain and be subject to general appropriation, by law, from the treasurer, or otherwise to be used by the State, in the same manner as the moneys received into the State from the ordinary sources of revenue.

SEC.2. *Be it further enacted*, That the county treasurer of the several counties entitled to a distributive share of the interest arising from the said fund, be, and they are hereby authorized, on the first day of May and November, of each and every year, to receive the share of said interest to which their counties respectively, are entitled, upon complying with the conditions hereinafter set forth.

SEC.3. *Be it further enacted*, That the secretary of State is hereby required to make out and furnish to the auditor of public accounts, a calculation, based on the area of territory in the Chickasaw purchase, of the proportionate amount of interest due to each of said counties; and it is hereby made the duty of said auditor to issue his warrant on the State treasurer for the said proportionate amount, upon application to him by said county treasurer, in person, or attorney in fact, accompanied with satisfactory proof that said county treasurer has fully complied with the requirements of this act. And it shall be lawful for any sheriff in this State to cash orders of the county treasurer of his county, for the amount of the interest due his county; and the auditor of public accounts is hereby authorized to receive said order from such sheriff, in his settlement of State taxes.

SEC.4. *Be it further enacted*, That before said county treasurer shall be entitled to receive said interest, or any portion thereof, they shall severally, annually, execute a bond, with three good securities, each of whom shall be worth the entire penalty of said bond, to be approved by the judge of the probate court of the proper county, in the penal sum of at least twice the amount to which said county is annually entitled, conditioned that said treasurer will faithfully perform the duties required of him by law in relation to said moneys, and that he will account for the said moneys that he, or his attorney in fact, may draw from the treasury.

SEC.5. *Be it further enacted*, That should any county treasurer fail to execute said bond for twenty days after being required so to do by the school commissioners of his county, or should said treasurer, from intemperance, incapacity or other cause, be unable, in the opinion of said school commissioners, to faithfully perform the duties by this act required of him, then the said school commissioners, after ten days public notice of the time and place of meeting for said purpose, shall proceed to elect some suitable person to discharge the duties of treasurer of said fund; and the person so elected, after giving the bond

required of the county treasurer in this act, shall be fully invested with all the power, and receive the same compensation, and be liable to all the penalties, as if he were county treasurer of said county.

SEC.6. *Be it further enacted*, That any treasurer or receiver of said moneys, who shall embezzle or fail to pay over any portion of the same, when lawfully required, shall be liable to the same prosecution, and on conviction, subjected to the same punishment that the sheriff of the various counties in this State now are or hereafter may be, for the embezzlement of public moneys.

SEC.7. *Be it further enacted*, That the board of police of each county shall fix the compensation of said treasurer, annually, for the service required by this act.

SEC.8. *Be it further enacted*, That said treasurer shall keep an accurate entry of everything pertaining to said interest fund, in a well-bound book; which book and all papers belonging to said fund, shall, at all times, be subject to the inspection of the school commissioners, and that a detailed statement of the situation of the whole of said interest fund shall be submitted to said commissioners every six months, and to the board of police annually.

SEC.9. *Be it further enacted*, That in those counties of the Chickasaw cession, where no school commissioners have been appointed, that the boards of police of said counties are hereby required to appoint five school commissioners, one for each police district; who shall hold their office for two years, and shall exercise all the powers, and be entitled to the same pay, as are the commissioners appointed under the act of the 16th February, 1850, entitled "an act to amend the several laws of this State in relation to the common schools, so far as it relates to Chickasaw county."

SEC.10. *Be it further enacted*, That the interest moneys in each county shall be held subject to the order of the board of school commissioners of such county, which is hereby authorized to expend the same in accordance to the existing laws, or laws that may be hereafter passed,

applicable to the respective counties of the Chickasaw purchase in relation to common schools.

SEC.11. *Be it further enacted*, That the auditor of public accounts be, and his hereby directed to issue scrip, to be used in the location and entry of any lands known as the internal improvement lands, - being the lands donated by the Congress of the United States to this State, for the purpose of internal improvements, - which scrip shall be issued to the amount of one hundred thousand acres to the New Orleans, Jackson and Great Northern Railroad Company, and to the amount of fifty thousand acres to the Misissippi Central Railroad Company; which scrip shall be in the words and figures following, viz:
"State of Mississippi.

The holder hereof is hereby authorized to enter any of the Internal Improvement lands in the State, not already entered, to the amount of _____acres, in the legal subdivisions of said land. This scrip is issued for account of —

_____ Railroad Company
No. _____Signed, _____,
Auditor of Public Accounts."

Which said scrip may be endorsed by the treasurer of the company holding the same, and shall be received as money; each acre in said scrip being valued at one dollar and seventy-five cents, and shall entitle the holder thereof to enter the amount of land therein mentioned, in the same manner as could now be entered with money; the holder paying the same fees as are now required by law; which said scrip shall, as to 12,800 acres, be for sections of land; for 12,800 for half sections, and for _____acres in quarter sections; and the railroad company receiving the same, shall pay said auditor one dollar for each scrip received by it, and shall issue to the State its certificate of capital stock for each acre of land - valuing the same at one dollar and seventy-five cents per acre; which stock shall be held by the State for the internal improvement fund, to be disposed of as now required by law.

SEC.12. *Be it further enacted*, That all said scrips not located in five years shall be null and void, and upon the return thereof to the State, certificates of stock to the amount of the sum shall be returned to the company returning it but neither of said companies shall enter or hold the said land entered, but may sell said scrip.

SEC.13. *Be it further enacted*, That said companies shall sell, whenever offered, for 1 75-100 dollars per acre in cash for said scrip.

SEC.14. *Be it further enacted*, That it is hereby made the duty of the auditor of public accounts to loan an amount equal to all moneys now in the treasury of this State arising from the sale or lease of the Chickasaw school lands, or which may hereafter come into the treasury from the sale or lease of said lands, to the extent of the sum of four hundred thousand dollars to the following railroad companies, in equal amount to each of said roads, viz: the Mississippi & Tennessee Railroad Company, the Mississippi Central Railroad Company, the Mobile & Ohio Railroad Company, and the New Orleans, Jackson & Great Northern Railroad Company, and shall issue his warrant in favor of the president or treasurer of each of said companies in equal amounts for the amount loaned each company respectively, directed to the treasurer of this State, who shall pay the same out of any money in the treasury not otherwise appropriated.

SEC.15. *Be it further enacted*, That it shall be the duty of the auditor of public accounts to loan said money for the space of seven years from the date of issuing his warrant, as above provided, with interest thereon at the rate of eight per cent. per annum, payable semi-annually, on the first day of April and October.

SEC.16. *Be it further enacted*, That said auditor shall take from each of said companies to which a loan is made as above provided, its obligation to repay, at the expiration of seven years, the amount so borrowed, and to pay four per cent. interest thereon at the periods mentioned in the last preceding section of this act; and shall take from each

company respectively, as collateral security, an amount of its first mortgage bonds, or first mortgage income bonds, secured on all the property and effects of said company, equal in amount to the sum thus loaned, and likewise an amount of the scrip or certificate of the capital stock of said company in four times the amount thus loaned.

SEC.17. *Be it further enacted*, That said certificates of stock so required to be taken as collateral security, shall be issued to the State of Mississippi, to be held by it as such security, which certificates, together with said bonds and obligation, which obligation shall be payable to the State, shall be deposited in the treasury of the State.

SEC.18. *Be it further enacted*, That it shall be the duty of each of said companies to pay the principal and interest according to the requirement of its obligation to pay the same; and should either of said companies fail to pay said principal and interest, or either, when due, and continue so in default for the space of sixty days, then the whole debt upon the first default as aforesaid shall be at once due, and unless paid by the company so in default, the mortgage lien upon the property and effects of such company may be enforced, and the securities deposited by it as aforesaid, shall, when received by the Governor or the legislature, be sold by the said treasurer of the State, at public auction, at the capital of the State, to the highest bidder for cash, and the proceeds of said sale shall be credited in the obligation of such company, and the residue, if any, paid to the company whose said bonds and stock are thus sold; *Provided, however*, That said treasurer shall give sixty days notice of the time, place and terms of said sale, by advertising the same in five newspapers in this State, one at least of which shall be published in Jackson, and one in one of the counties through which said road is located.

SEC.19. *Be it further enacted*, That should the securities required of the aforesaid companies, or either of them, depreciate in value after the same are deposited in the treasury of the State, so as to be insufficient to secure

the amount borrowed by either of said companies, then, although the interest on the sum so borrowed may be promptly paid by such company, yet it shall be lawful for any succeeding legislature of this State to require of such company additional and sufficient security to render safe the principal borrowed by such company, and upon the failure to provide such additional security within such time as may be prescribed, the whole debt of such company shall at once become due, and payment of the same may be enforced in the manner prescribed in the preceding section of this act.

SEC.20. *Be it further enacted*, That the money so loaned to said railroad companies shall be expended by them respectively upon such portions of their several roads as are within the limits of this State and that loaned to the New Orleans, Jackson & Great Northern Railroad Company, and the proceeds of the land scrip received by said company under the provisions of this act, shall be expended by said company upon that portion of their road south of the town of Canton, in Madison county, of this State, and any of said companies violating the provisions of this section, shall forfeit its right to any further loan that it might otherwise be entitled to under the provisions of this act.

SEC.21. *Be it further enacted*, That each and all of said companies as shall avail themselves of the provisions of this act, shall receive on their roads respectively, freighted cars from any railroad connecting therewith in this State, and transport the same, without delay, over said road, without changing the load or loads thereof, and return said cars to the place from whence they were taken, on the return trip of the same train, if practicable; and for each freighted car so received, said company receiving the same shall place at the disposal of the company from which the freighted cars were taken, an equal number of empty cars, if within its power, and the charge for transporting the freight contained in said car or cars shall not exceed the amount or price charged for similar freight transported by such company in its own cars, the same distance, over the same portions of their road: *Provided*, That no com-

pany shall be required to receive such cars on their road unless constructed of the same gauge with their own, and are, in the opinion of their superintendent or agent, in good condition, and of sufficient strength to perform the trip required; nor shall any company be required to receive and transport the cars of any other company to the exclusion of its own.

SEC.22. *Be it further enacted*, That should either of the four railroad companies named in this act fail or refuse, for the space of sixty days after the passage of the same to apply for its rateable share of the loan herein provided for, and upon the terms and conditions herein above stipulated, then it shall be the duty of the auditor of public accounts to divide and loan the share so refused by such company or companies, in equal parts, among the other companies named in this act, that may comply with the provisions of the same.

SEC.23. *Be it further enacted*, That any of the railroad companies named in this act shall borrow or receive money under the provisions of the same shall be held to have accepted, and to be bound by all of its provisions and requisitions as fully, to all intents and purposes as though they were a part of the original charter of such company.

SEC.24. *Be it further enacted*, That this act shall take effect and be in force from and after its passage.

APPROVED March 7, 1856.

1859 Miss. Laws 193 ch. CXXVIII.

AN ACT to amend an act to provide for the payment of interest on the Chickasaw School Fund, and for other purposes.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the time for issuing and locating scrip on the internal improvement lands, for the benefit of the New Orleans, Jackson and Great Northern Railroad, and the Mississippi Central Railroad, under the provisions of said act, be and the same is hereby extended for the period of five years from and after the expiration of the time provided in said act.

SEC.2. *Be it further enacted*, That this act take effect and be in force from and after its passage.

APPROVED, Feb. 11, 1860.

1888 Miss. Laws 43 ch. XXIV

AN ACT to reduce the rate of interest on the Chickasaw School Fund.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the rate of interest on the Chickasaw School Fund be and is hereby fixed at seven (7) per cent. interest per annum, and all acts and parts of acts in conflict with this act be and the same are hereby repealed, and this act shall take effect from and after the first (1st) day of May, 1888.

APPROVED, March 9, 1888.

1985 Miss. Laws 27 ch. XXIII.

AN ACT TO PROVIDE A FORMULA FOR THE DETERMINATION OF THE AMOUNT OF FUNDS TO BE APPROPRIATED ANNUALLY INTO THE CHICKASAW SCHOOL FUND; TO PROVIDE FOR THE DISTRIBUTION OF SUCH FUND BY THE STATE DEPARTMENT OF EDUCATION TO THE SCHOOL DISTRICTS IN CHICKASAW COUNTIES; TO REQUIRE BOARDS OF EDUCATION TO SETTLE TITLE TO ANY REMAINING CHICKASAW LANDS; AND FOR RELATED PURPOSES.

Be it enacted by the Legislature of the State of Mississippi:

SECTION 1. (1) Beginning with the 1985-1986 fiscal year the Legislature of the State of Mississippi shall appropriate to the State Department of Education a sum of One Million Dollars ($1,000,000.00) to be dispursed to the Chickasaw counties, and an additional One Million Dollars ($1,000,000.00) each succeeding fiscal year thereafter until a maximum appropriation of Five Million Dollars ($5,000,000.00) is made for the fiscal year 1989-1990. Beginning with the appropriation for the 1990-1991 fiscal year, the amount appropriated under the provisions of this act shall not exceed the total average annual expendable revenue per teacher unit received by the Choctaw counties from school lands, or Five Million Dollars ($5,000,000.00), whichever is the lesser.

(2) The State Department of Education is hereby authorized, empowered and directed to allocate for distribution such funds appropriated each year under subsection (1) of this section in proportion to the number of teacher units allotted under the minimum program, to such school districts affected by the sale of Chickasaw cession school lands. School districts not wholly situated in Chickasaw cession affected territory shall receive a prorated amount of such allocation based on the percentage of such lands

located within the district. Provided further, that the State Department of Education shall in addition deduct from each affected school district's allocation the amount such district shall receive from interest payments from the Chickasaw School Fund under Section 212, Mississippi Constitution of 1890 for each fiscal year. The total number of teacher units in the Chickasaw counties shall be computed by the State Department of Education. The department shall document the foregoing computation in its annual budget request for the appropriation to the Chickasaw School Fund, and shall revise its budget request under such formula as the average annual revenues from sixteenth section school lands fluctuate.

SECTION 2. In no event shall any sums to be paid to the Chickasaw counties on schools therein pursuant to Section 212, Mississippi Constitution of 1890, be reduced by operation of this act to an amount below that required by Section 212. It is the intent of the Legislature to increase the annual appropriation to the Chickasaw counties in order to equitably compensate them for each acre of sixteenth section land which they have lost through sale by the state.

SECTION 3. Notwithstanding the provisions of Section 29-1-63, it shall be the duty of the county board of education in any county within the Chickasaw cession to ascertain whether or not such county has title to any Chickasaw lands to which it may, by law, be entitled by virtue of long-term leases. If it is determined that any such land does exist, the board shall proceed to settle the title to such property and, if possible, lease the land pursuant to the provisions of Chapter 3, Title 29, Mississippi Code of 1972, applicable to the management of sixteenth section and lieu lands.

SECTION 4. This act shall take effect and be in force from and after July 1, 1985.

APPROVED: March 26, 1985

No. 85-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

B.H. PAPASAN
SUPERINTENDENT OF EDUCATION, *et al.*,
Petitioners,

v.

WILLIAM A. ALLAIN
GOVERNOR, STATE OF MISSISSIPPI, *et al.*,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF ON THE MERITS

ORMA R. SMITH, JR.
SMITH, ROSS & TRAPP, P.A.
508 Waldron Street
Post Office Box 181
Corinth, Mississippi 38834
(601) 286-9931

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(Counsel of Record)
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FREELAND & FREELAND, LAWYERS
1013 Jackson Avenue
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Oxford, Mississippi 38655
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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. May the Chickasaw Cession schoolchildren be afforded prospective injunctive relief to prevent the continuation of, a.. . to remedy the current conditions resulting from, the breach of the federal school lands trust by state officials?

2. Does the discriminatory denial of a minimally adequate free public education to the Chickasaw Cession schcolchildren constitute a violation of the equal protection clause?

LISTING OF PARTIES

Petitioners:

B.H. PAPASAN, Superintendent of Public Education, Tunica County School District, Tunica, Mississippi;
WESLEY BAILEY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
JOHN E. MATTHEWS, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
RICHARD HUSSEY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
E.M. HOOD, JR., Member, Board of Education, Tunica County School District, Tunica, Mississippi;
CLIFFORD GRANBERRY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
JAMES E. HATHCOCK, Superintendent, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
JIM YOUNG, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
RUSSELL JACKSON, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
FAITH WEST, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
KELLY TUCKER, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
DON BETHAY, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
TONY V. PARKER, Superintendent of Public Education, Alcorn County School District, Corinth, Mississippi;
H.T. BENDERMAN, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
RAY HUGHES, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
FRANK ELDRIDGE, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;

BOBBY CALDWELL, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
HERSCHEL WILBANKS, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
HOLACE MORRIS, Superintendent, Amory Municipal Separate School District, Amory, Mississippi;
HERMON HESTER, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
DAVID HODO, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
EDDIE WOMBLE, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
W.G. PRUEITT, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
THOMAS GREER, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
DOUGLAS AUTRY, Superintendent of Public Education, Benton County, School District, Ashland, Mississippi;
LAFAY WEATHERLY, Member, Board of Education, Benton County School District, Ashland, Mississippi;
SHIRLEY MOHUNDRO, Member, Board of Education, Benton County School District, Ashland, Mississippi;
MINNIE LEE CHILDERS, Member, Board of Education, Benton County School District, Ashland, Mississippi;
JOHN DAUGHTERY, Member, Board of Education, Benton County School District, Ashland, Mississippi;
JOE GRIST, Member, Board of Education, Benton County School District, Ashland, Mississippi;
GRADY FERGUSON, Superintendent of Education, Calhoun County School District, Pittsboro, Mississippi;
MIKE DUNAGIN, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
BROOKS BRASHER, Member, Board of Education, Calhoun County School District, Pittsboro, Mississisppi;
CHARLIE CLARK, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
CHARLES C. HARDIN, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;

PAUL LOWE, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
O. WAYNE GANN, Superintendent, Corinth Municipal Separate School District, Corinth, Mississippi;
GLEN PARKER, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
SARAH HARRIS, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
J.B. DARNELL, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
WILLIE DAVIS, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
JOHN BREWER TOMLINSON, JR., Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
ALBERT L. BROADWAY, Superintendent of Public Education, DeSoto County School District, Hernando, Mississippi;
ROBERT C. DICKEY, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
HARVEY G. FERGUSON, JR., Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
WAYNE D. HOLLOWELL, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
HAROLD O. MOORE, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
MARTHA TACKETT, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
DWIGHT SHELTON, Superintendent, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
ROBERT HILL, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
PARKER BELL, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
DONALD STREET, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;

TRUDY BYARD, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
CHRISTINE RATCLIFF, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
JERRY STONE, Superintendent, Iuka Special Municipal Separate School District, Iuka, Mississippi;
C. NEIL DAVIS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
CHARLES LEWIS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
NEIL SCHILLINGS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
FRANK JIMMAR, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
STANLEY DEXTER, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
JIMMY LYNN NELSON, Superintendent of Public Education, Lafayette County School District, Oxford, Mississippi;
EARL BABB, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES E. HAMILTON, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES C. STONE, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
WILLIAM BUFORD, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
C.W. WHITE, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES R. BRYSON, Superintendent, New Albany Municipal Separate School District, New Albany, Mississippi;
BOBBY GAULT, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
BEN KITCHENS, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;

DAVID HOLMES, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
DR. DAVID ELLIS, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
MALCOLM HICKEY, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
HOSEA A. GRISHAM, Superintendent, North Panola Consolidated School District, Sardis, Mississippi;
DEMSEY COX, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
CHARLES BLAKELY, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
TAYLOR JEFF McLEOD, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
REID P. DORR, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
POLLY GORDON, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
BILLY D. STROUPE, Superintendent, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
TATE RUTHERFORD, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
FRANCIS HOPPER, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
JOE McMILLAN, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
BILLY H. AYERS, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
J.W. McMILLAN, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
DR. BOB McCORD, Superintendent, Oxford Municipal Separate School District, Oxford, Mississippi;
LEONARD E. THOMPSON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
REBECCA L. MORETON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;

RONALD F. BORNE, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
DOROTHY B. HENDERSON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
W.N. LOVELADY, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
JOE B. HARTLEY, Superintendent of Public Education, Panola County School District, Batesville, Mississippi;
WILLIAM STILL TAYLOR, Member, Board of Education, Panola County School District, Batesville, Mississippi;
ANN WHITTEN BRAME, Member, Board of Education, Panola County School District, Batesville, Mississippi;
TRAVIS D. MURPHREE, Member, Board of Education, Panola County School District, Batesville, Mississippi;
CECIL WARDLAW, Member, Board of Education, Panola County School District, Batesville, Mississippi;
HARRY O'NEILL, Member, Board of Education, Panola County School District, Batesville, Mississippi;
BILLY CURBOW, Superintendent, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
BUDDY MONTGOMERY, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
LARRY YOUNG, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
THOMAS CHEWE, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
RAY LEEPER, JR., Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
JEAN MAPP, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
JAY W. GREENE, Superintendent of Public Education, Prentiss County School District, Booneville, Mississippi;
EDWIN BROWN, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
LARRY JOE CROSBY, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;

CLIFTON RUMMAGE, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
BILLY WIMBERLEY, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
HAROLD WOODRUFF, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
C.R. RIALS, Superintendent, Senatobia Municipal Separate School District, Senatobia, Mississippi;
MILLS CARTER, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
W.R. PERKINS, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
JAMES JACKSON, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
MAURICE BATEMON, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
DAVID C. COLE, Superintendent, South Panola Consolidated School District, Batesville, Mississippi;
BRYANT WOODRUFF, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
O.T. MARSHALL, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
J.H. MOORE, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
ALTON MILAM, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
LEONARD MORRIS, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
JACK HARRIS, Superintendent, South Tippah Consolidated School District, Ripley, Mississippi;
CLARENCE STANFORD, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
EDWARD BURGE, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;

T.C. MAUNEY, JR., Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
J.C. NEWBY, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
H.L. HELLUMS, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
DONALD MERRITT CLANTON, Superintendent Of Public Education, Tate County School District, Senatobia, Mississippi;
BYRON DURLEY, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
ROBERT BARRY EMBREY, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
STEVE BENTON LENTZ, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
HUEL STANLEY BLAIR, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
SAMMY BENFORD ASHE, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
DR. JULIAN PRINCE, Superintendent, Tupelo Municipal Separate School District, Tupelo, Mississippi;
AARON MORGAN, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
JIMMY FLOYD, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
MRS. DOYCE REAS, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
CHARLIE GREEN, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
STEVE NORWOOD, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
SAMMY S. DOWDY, Superintendent of Public Education, Union County School District, New Albany, Mississippi;
L.H. PARNELL, Member, Board of Education, Union County School District, New Albany, Mississippi;
CLEO FOOSHEE, Member, Board of Education, Union County School District, New Albany, Mississippi;

GARLAND GRAY, Member, Board of Education, Union County School District, New Albany, Mississippi;
IRA KUYKENDALL, Member, Board of Education, Union County School District, New Albany, Mississippi;
PALMER SMITH, Member, Board of Education, Union County School District, New Albany, Mississippi;
ALFRED S. REED, JR., Superintendent, Water Valley Line Consolidated School District, Water Valley, Mississippi;
FRANK B. BROOKS, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
LILLY B. HORAN, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
DANNY ROSS INGRAM, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
BENNIE COLE TAYLOR, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
JOHN EDDIE ROGERS, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
TOM LOTT, Superintendent, West Point Municipal Separate School District, West Point, Mississippi;
ROBERT L. CALVERT, III, Trustee, West Point Municipal Separate School District, West Point, Mississippi;
PETER THOMAS HODO, JR., Trustee, West Point Municipal Separate School District, West Point, Mississippi;
JOHN H. PARKER, SR., Trustee, West Point Municipal Separate School District, West Point, Mississippi;
WILLIAM LESLIE CHRISTIAN, Trustee, West Point Municipal Separate School District, West Point, Mississippi;
CORNELIA WALKER, Trustee, West Point Municipal Separate School District, West Point, Mississippi;

LASONDRA ADDISON, a minor, by and through her mother and next friend, Linda Addison;

CHARLES RAY ALLEN, II, a minor, by and through his father and next friend, Charles Ray Allen;
NANCY ELIZABETH BEEBE, a minor, by and through her father and next friend, Robert John Beebe;
PHYLLIS CAROL BELL, a minor, by and through her father and next friend, Wallace L. Bell;
KERRY MILLS BRYSON, a minor, by and through his father and next friend, James R. Bryson;
JONATHAN ANDREW BUNCH, a minor, by and through his father and next friend, Austin W. Bunch;
MELISSA ANNE CLEMMONS, a minor, by and through her father and next friend, John Edgar Clemmons, Jr.;
CARL RICKEY COLEMAN, a minor, by and through his father and next friend, Albert Coleman;
DEE ANN COX, a minor, by and through her father and next friend, Bobby Joe Cox;
J0 VICKI DENISE GANN, a minor, by and through her father and next friend, O. Wayne Gann;
GALEN VINCENT HENDERSON, a minor, by and through his father and next friend, G.W. Henderson, Jr.;
SHERRY RENAE HOGUE, a minor, by and through her father and next friend, Charles Archer Hogue;
YOLANDA JACKSON, a minor, by and through her mother and next friend, Sarah A. Jackson;
FLORENCE DENISE JONES, a minor, by and through her father and next friend, Cleveland Hoover Jones;
AMY J. LIVINGSTON, a minor, by and through her father and next friend, Stephen Price Livingston, Sr.;
MINNIE LUCILLE LONG, a minor, by and through her father and next friend, John Henry Long;
UNSELD MASON, a minor, by and through his mother and next friend, Shirley Mason;
PRELNA RENEE McNEIL, a minor, by and through her mother and next friend, Juanita W. McNeil;

CHRISTOPHER DOUGLAS PRUETT, a minor, by and through his father and next friend, Kenneth Douglas Pruett;
SCOTTY GLEN PURDEN, a minor, by and through his grandmother, guardian and next friend, Grace Purden;
SAMMY CLARK RICHEY, a minor, by and through his father and next friend, Samuel Larry Richey;
RYAN K. ROBINSON, a minor, by and through his mother and next friend, Mary K. Robinson;
THOMAS JASON RUSSELL, a minor, by and through his father and next friend, Jimmy Darrell Russell;
MICHAEL EDWARD SMITH, a minor, by and through his father and next friend, Ralph Edward Smith;
SHARLENE ANN STOREY, a minor, by and through her father and next friend, Thomas B. Storey;
WALTER LEE WELCH, a minor, by and through his mother and next friend, Francis Onell Welch;
JAMES MIKE WORTHAM, a minor, by and through his mother and next friend, Inell Corbitt Wortham;
DANIEL GRIFFIN WREN, a minor, by and through his father and next friend, Tommy Wayne Wren.

Respondents:

WILLIAM A. ALLAIN, Governor, State of Mississippi;
RICHARD MOLPUS, Secretary of State and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
RICHARD A. BOYD, Superintendent of Education and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
EDWIN LLOYD PITTMAN, Attorney General and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
CONNIE SLAUGHTER-HARVEY, Assistant Secretary of State, State of Mississippi

The original federal defendants have, by joint stipulation, been dismissed from this lawsuit. The federal defendants no longer have an interest in this case and are not parties to the petitioning of this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

CERTIFICATE OF SERVICE

I, T.H. FREELAND, III, counsel of record for petitioners, do hereby certify that I have this day mailed, postage prepaid, three true and correct copies of Brief on the Merits and Joint Appendix to:

HONORABLE R. LLOYD ARNOLD
SPECIAL ASSISTANT ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205

This, the 24th day of January, 1986.

T.H. FREELAND, III

OPINIONS BELOW

Court of Appeals: The panel decision of the Court of Appeals for the Fifth Circuit, dated April 5, 1985, is reported as *Papasan v. United States*, 756 F.2d 1087 (1985)(P.A. A-3).* The Order denying rehearing or rehearing *en banc* was issued on May 21, 1985 (P.A. A-1).

District Court: The Order dismissing with prejudice is unpublished (P.A. A-37).

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was delivered on April 5, 1985. A timely petition for panel rehearing and a suggestion for rehearing *en banc* was denied May 21, 1985. By Order of August 6, 1985, petitioners' time to file a Petition for a Writ of Certiorari was extended to September 18, 1985, and the Petition was filed on that date. On December 2, 1985, this Court granted the Petition for Writ of Certiorari, and on January 3, 1986, Petitioners' time to file its Brief on the Merits was extended to January 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1948).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

U.S. Const. art. I, § 10

> "No State shall...pass any...Law impairing the Obligation of Contract..."

U.S. Const. amend. XIV, § 1

> "No state shall...deny to any person within its jurisdiction the equal protection of the laws."

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*References to the Appendix to the Petition for Writ of Certiorari are indicated by (P.A.). References to the Joint Appendix are indicated by (J.A.).

Federal Statutes:

1803 Land Sales Act for Mississippi 2 Stat. 229 ch. XXVII (1803)(J.A. 54).

Mississippi Enabling Act, 3 Stat. 348 ch. XXIII (1817)(J.A. 56).

Authorization of Sale of Lieu Lands, 10 Stat. 6 ch. XXXV (1852)(J.A. 63).

42 U.S.C. § 1983 (1979)

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects or causes to be subjected, any citizen...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Course of Proceeding and Disposition Below

This action was filed in the United States District Court for the Northern District of Mississippi, Delta Division. (J.A. 1). The Petitioners are schoolchildren, school superintendents, and members of school boards of the twenty-three Chickasaw Cession counties in North Mississippi. The respondents are a group of officials of the State of Mississippi charged with carrying out the duties of the state as trustee of the school lands trust. Complaint ¶ 13 (J.A. 5). The state officials who were sued were: the Governor, the Secretary of State, the State Superintendent of Education, the Attorney General, and the Assistant Secretary of State in charge of the State Land Office. Complaint ¶ 13 (J.A. 5).

The complaint alleged that state officials were committing a continuing breach of the federal school lands trust, and that the breaches violated the contracts clause as well as the equal protection clause. The state officials filed a motion to dismiss for failure to state a claim. (J.A. 31). This motion was granted by the district court. (P.A. A-36-38). On appeal, the Court of Appeals for the Fifth Circuit affirmed the dismissal, rejecting the equal protection claim on the merits, and holding that all other claims—including law claims for prospective, injunctive relief for federal school land trust violations—were barred by the eleventh amendment. *Papasan v. United States*, 756 F.2d 1087, 1096 (5th Cir. 1985) (P.A. A-35). On May 21, 1985, the Fifth Circuit issued an order denying a rehearing en banc. (P.A. A-1). After additional time for filing was granted, a timely Petition for Writ of Certiorari was filed in this Court on September 18, 1985. On December 2, 1985, certiorari was granted by this Court.

STATEMENT OF FACTS[1]

(A) The Allegations and Claims of the Complaint

The Complaint alleged that the State of Mississippi acquired its title and duties as trustee for a school lands trust that is

> irrevocable and [granted] in perpetuity for the use and benefit of Plaintiffs and the Plaintiff class. . . .
>
> -Complaint ¶ 42 (J.A. 16).

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[1] This case was dismissed on a motion under Fed. R. Civ. P. 12(b), making the record woefully undeveloped. The statement of facts is based primarily on the allegations of the complaint, statutory and public-record documents such as the Mississippi state budget, governmental reports, and materials from historical treatises.

In derogation of their duties as trustee, state officials sold the lieu lands that had been given. Complaint ¶¶ 30-32, 45, 47 (J.A. 12, 17-18). The proceeds from the sale were not set aside or reserved, but rather were "invested by the State Defendants in unwise, imprudent, and unlawful investments . . . [which] [b]y reason of the defaults of the State Defendants, . . . have all failed and the funds accordingly been lost." Complaint ¶ 32(a)(J.A. 12-13). The state officials had the duties of a common-law trustee in managing the trust. Complaint ¶ 45 (J.A. 17-18). The breach of these duties by state officials form the basis of the claim for mismanagement of the trust. They also form the basis of the claims for violation of the contracts clause. Complaint ¶¶ 45, 57-58 (J.A. 17-18, 22). Breach of both the federal trust obligations and the contracts clause formed the basis for a claim under 42 U.S.C §1983. Complaint ¶¶ 47(h), 57, 58 (J.A. 18, 22).

The Complaint further alleges that state officials have guaranteed and provided for schoolchildren in the non-Chickasaw Cession counties a fully-funded school lands trust, while denying a fully-funded trust in the Chickasaw counties. Complaint ¶¶ 37-38, 51-55 (J.A. 14-15, 20-22). The complaint alleged that the discrimination is irrational and violates the equal protection clause of the fourteenth amendment to the United States Constitution. Complaint ¶ 55 (J.A. 21-22). This equal protection claim formed the basis for a claim under 42 U.S.C. §1983. Complaint ¶ 47, 51 (J.A. 18, 20). These claims constitute petitioners' action against the state officials.

(B) The Creation Of The School Lands Trust

The creation of a trust for the support of public schools was a constant part of congressional policy throughout the history of western expansion, beginning with the states carved out of the Northwest Territories and continuing through the admission of Alaska to statehood. Between 1803 and 1962, the United States granted some 78,000,000 acres to newly established states to fund their respective school lands trusts. *Lassen v. Arizona*, 385 U.S. 458, 460 n.3 (1967).

These trusts were created and funded by two distinct groups of acts of Congress: (1) the land sales acts used to dispose of public lands, containing provisions reserving sixteenth sections from sale; and (2) the enabling acts used to admit new states to the Union, requiring the states make certain promises in exchange for receiving the benefits of statehood. Among the benefits of statehood was the school lands trust. Congress began creating the trust through land sales acts and enabling acts in its legislation governing the Northwest Territories.

On May 20, 1785, the Northwest Ordinance was passed, containing the provision: "There shall be reserved the central section of every township, for the maintenance of public schools within the said township." XXVIII Journals of the Continental Congress 298, 301 (1933) (1785 Ordinance for ascertaining the mode of disposing of lands in the western territory)(J.A. 49-50). The 1785 Ordinance became the model for later land sales acts. The reservation of school lands contained in the Ordinance remained a part of the federal policy in dealing with public land throughout the history of western expansion.

The policy of grants for public education expressed in the land sales act was confirmed by its repetition in the enabling acts admitting new states into the Union. Beginning with the enabling act for the first new state formed from the Northwest Territories, the State of Ohio, Congress provided: "[T]he section number 16, in every township, and where such section has been sold, granted or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools." 2 Stat. 173 ch. XL, § 7 (1802)(Ohio Enabling Act)(J.A. 52)[2] In exchange for the school lands trust and other benefits, the State of Ohio agreed not to tax newly patented lands for five years after initial sale. 2 Stat. 173 ch. XL, §7 (1802) (J.A. 52).

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[2]The Ohio enabling act was later amended to provide additional sixteenth sections as Indian treaties made new lands available for survey and sale. 2 Stat. 225 ch. XXI (1803)(J.A. 53).

As this Court recognized in *Andrus v. Utah*, 446 U.S. 500, 507 (1980), enabling acts—beginning with the act for Ohio—were contracts under which the new states made promises to the federal government in return for benefits that included the school lands trust. *See* Hibbard, *A History of the Public Land Policies* at 309-310 (1915) (discusses contract in Ohio's enabling act); Knight, "History and Management of Land Grants for Education in the Northwest Territory," in Vol. I No. 3 *Papers of the American Historical Association* at 27-29 (1885)(same).[3]

When Georgia ceded its claims to lands that are now Alabama and Mississippi, it made as a condition of cession that the territories be governed under the same terms as the Northwest Territory. V *The Territorial Papers of the United States: The Territory of Mississippi, 1798-1817* at 145 (1937)(1802 Georgia Cession)(J.A. 47-49). Following the articles of cession, Congress—on the same day it amended Ohio's enabling act to make additional sixteenth section grants from newly available lands[4]—enacted the Land Sales Act of 1803, which provided for the first public land sales in Mississippi. 2 Stat. 229 ch. XXVII (1803) (J.A. 54-55). Section 12 of the land sales act provided for the sale of the lands "with the exception of the section number sixteen, which shall be reserved in each township for the support of the schools within the same. . . ." 2 Stat. 229 ch. XXVII, § 12 (J.A. 55). The second land sales act for Mississippi contained an essentially identical reservation of sixteenth sections. 3 Stat. 375 ch. LXIII (1817)(J.A. 59).

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[3] Some of the enabling acts, such as that of Ohio, expressly provided that the State receive school lands and other benefits in return for the promises required in the enabling acts. 2 Stat. 173 ch. XL § 7 (1802)(J.A. 52). Others required that the state make return promises for receiving the benefits of statehood, but without enumerating the school lands trust already set out in the land grant statutes. Both forms of enabling acts were contracts creating a school lands trust. Mississippi had the latter form of enabling act.

[4] *Cf.* 11 Annals of Cong. 1097, 1117 (1851)(during discussion in 1802 of the Ohio area of the Northwestern Territories' admission to Union, Mississippi's situation also raised).

The enabling act allowing Mississippi to form a state government was passed in 1817. As with Ohio and other newly admitted states, the enabling act admitting Mississippi to statehood was conditional upon an agreement by the states not to tax newly patented lands for five years. 3 Stat. 348 ch. XXIII (1817)(J.A. 56-58). Mississippi accepted the duties of trustee upon statehood—its first Constitution provided that the school lands would not be sold. Miss. Const. art. VI, § 20 (1817)(J.A. 64).

(C) The Funding and Defunding of the Chickasaw Cession's School Lands Trust

The Chickasaw Cession trust was fully funded by the United States. The lands of the cession remained Indian lands until the Treaty of Pontotoc Creek extinguished Indian title in 1832. Gibson, *The Chickasaws* at 159-160 (1971); Rohrbough, *The Trans-Appalachian Frontier: People, Societies, Institutions, 1775-1850* at 314 (1978). Following the treaty, the public lands in the cession were to be sold under the second Mississippi land sales act of 1817. 3 Stat. 375 ch. LXII (1817)(J.A. 59-60). Although the terms of the land sales act call for reservation of the school lands, the local federal land sales offices nevertheless sold the sixteenth sections in the Chickasaw Cession. Because of this improper sale, the federal government in the late 1830's and early 1840's provided Mississippi with lieu lands for the benefit of the Chickasaw Cession's schools (hereinafter referred to as the "lieu lands"). 5 Stat. 116 ch. CCCLV (1836) (providing for selection of lieu lands by treasury secretary)(J.A. 61); 5 Stat. 490 ch. XL (1842) (amending 1836 act to allow selection of lands by Mississippi Governor)(J.A. 62). These lieu lands consisted of large tracts of land outside the Chickasaw Cession in North Mississippi. Complaint ¶ 29 (J.A. 11-12). Mississippi accepted the lieu lands once they had been selected. 1844 Miss. Laws 238 ch. LXVIII (J.A. 80-81).

After the lieu lands had been held for four years, they were leased for ninety-nine year terms. Although state officials leased the lieu lands and received payments for the leases, the state officials did not pay interest on the

funds received, or even to distribute the income to the beneficiaries of the trust. 1848 Miss. Laws 62 ch. III, § 2 (J.A. 82). While the sale of 174,555 acres was in form a "public auction" with a "minimum price" of six dollars an acre, 1848 Miss. Laws 62 ch. III, §§ 2-3 (J.A. 82-83), they produced $1,047,330.00; a yield of exactly six dollars an acre and not a penny more. State Auditor and Secretary of State of the State of Mississippi *Special Report on Chickasaw Cession School Districts* at 2 (1984) (hereinafter "*Chickasaw Cession Report*") (containing acreage and yield figures).

In 1852, after the state officials were four years into the process of leasing the lieu lands, Congress authorized the state to either sell or lease the lieu lands. In doing so, Congress protected the beneficiaries of the trust in several ways: (1) it required the state as trustee "to invest the money arising from the sales . . . for the use and support of the school . . . and for no other purpose whatsoever"; (2) it required that the lieu lands "shall, in no case be sold or leased without the consent of the inhabitants of such township or district"; and (3) it required that the money realized "be appropriated to use of schools. . . ." 10 Stat. 6 ch. XXXV (1852)(J.A. 63).

The state officials responded by selling the lieu lands at the same price they had been previously leasing the lands. Anyone who had already leased lieu lands was then allowed to convert their leasehold to a fee title by simply applying to the state and paying a clerical fee. 1854 Miss. Laws 348 ch. CCXVII (J.A. 86). Fee titles in trust property were thus given up for no additional consideration. Furthermore, there was no compliance with Congress' express requirements: that consent of the beneficiaries be obtained, that the funds be invested to yield income, and that the funds be turned over for local management. *See* Complaint at ¶ 40 (J.A. 15).

In 1856, the state officials converted the trust funds to uses unconnected with the trust. The funds were to remain in state hands "in the same manner as moneys received

in the state from ordinary sources of revenue." 1856 Miss. Laws 141 ch. LVI, § 1(J.A. 87). The funds were used to obtain internal improvements for the state—they were to be loaned to five railroads for seven years so that the railroads could lay track within the state. 1856 Miss. Laws 141 ch. LVI, §§ 14-15 (J.A. 91). This loan to the railroads was highly speculative. Mississippi's railroads had a long history of extreme economic difficulty. *See* Gonzales, "Flush Times, Depression, War, and Compromise," in I *A History of Mississippi* 284, 289-291 (McClemore ed. 1973)(discussing economic failures of Mississippi's railroads prior to this period); Friedman, *A History of American Law* at 158 (1973)("government promotion of railroads besmirches the era's purity . . ., [and was] a constant undercurrent of state legislation"). The railroads chosen to receive the loans had no history of success and were strapped for funds. For example, the Mississippi Central, within two years of the loan had expended all its loan and stock sale proceeds, yet was still unable to either complete its line or purchase rolling stock. Corliss, *Mainline of Mid-America* at 187-188 (1951).

As the railroad loans began to become due, to avoid default, additional time was allotted for some railroads to pay. 1859 Miss. Laws 193 ch. CXXVIII (J.A. 95). After the Civil War, the railroads either defaulted or made settlements with worthless paper, resulting in an almost total loss. *Chickasaw Cession Report* at 2. At some point after its total conversion of the corpus, the state itself began paying interest at eight percent under the 1856 act. 1856 Miss. Laws 141 ch. LVI, § 1 (J.A. 87). This annual "interest" on the now-lost fund was subsequently reduced to seven percent, 1888 Miss. Laws 43 ch. XXIV (J.A. 96), and then, by the 1890 Mississippi Constitution, to six percent. Miss. Const. art. VIII, § 212 (1890)(J.A. 65). Thus, the trust—once funded by 174,555 acres of land—was converted to a fund of only $1,047,330, which was then completely lost. After the conversion, it "produced" a "remedial" payment by state officials of only $62,191.00 each year, or thirty-six cents an acre. *Chickasaw Cession*

Report at 2-3 (J.A. 37). The state has never repudiated its obligations under the trust.

As noted in a special report by Mississippi's Auditor and Secretary of State, many of the school districts in the Cession are "financially unsound" as a result of the lack of school land funds, and are able to continue viable operations only by operating in violation of state accounting and budgeting laws. If these schools were made to comply with state accounting and budgetary procedures, some might be forced to close. *Chickasaw Cession Report* at 4 (J.A. 39). The Legislative Audit Committee of the Mississippi Legislature proposed that the Chickasaw Cession school districts receive "equitable treatment" through a legislative endowment fund. Legislative Audit Committee, *Report to the Mississippi Legislature: A Special Report on Sixteenth Section Land Management* at 88-92 (1977) (hereinafter "*Legislative Audit Committee Report*"). The state Superintendent of Education appended to the committee report a comment that: "The present procedure is highly discriminatory." *Legislative Audit Committee Report* at 164.

While this action has been pending in the Fifth Circuit Court of Appeals, the Mississippi Legislature in its 1985 session passed "An Act to Provide a Formula for the Determination of the Amount of Funds to be Appropriated Annually into the Chickasaw School Fund. . . ." 1985 Miss. Laws 27 Ch. XXIII (J.A. 97-98).[5] The statute provides that the legislature "shall appropriate" to the State Department of Education a sum of one million dollars to be disbursed to the Chickasaw Cession counties during the year 1985, and further provides for the appropriation of an additional one million dollars for each year until a maximum appropriation of five million dollars for the fiscal year 1989-1990 is achieved. The act also provides that the amount of the appropriation would be cut in any year that it exceeds the average revenue "per teacher unit" received from school lands by the counties in the rest of the state. Further appropriations to carry out the mandate of this statute depend upon the whims of each annual session of the Mississippi Legislature.[6] Nor will the appropriation, if made, achieve the amount required *as of 1983* to place the Chickasaw Cession counties on a par with the remaining fifty-nine counties in the State. *Chicksaw Cession Report* at 3 (J.A. 38).

[5] In recent years the Mississippi Legislature has become accustomed to responding affirmatively, albeit inadequately, to litigation in both the federal and state courts. *See Gates v. Collier*, 616 F.2d 1268, 1280 (5th Cir. 1980)(prompted legislature to remedy unconstitutional conditions in state prisons); *State Tax Commission v. Fondren*, 387 So. 2d 712, 724-26 (Miss. 1980)(forced reassessment of real property throughout state in response to constitutional mandate).

Before the 1985 legislation, the schools of the Chickasaw Cession received about 63¢ per pupil and 36¢ per acre in payments in lieu of trust income, while the non-Chickasaw Counties averaged $75.34 per pupil and $42.00 per acre. The receipts for an average county outside the cession were $172,856.00, while the receipts for an average county within the cession were $2,704.00. *Chickasaw Cession Report* at 3 (J.A. 37). The 1985 legislation provides for fiscal year 1985-1986 about $10.75 per each of the 99,163 schoolchildren, or $6.11 for each of the 174,555 acres that should be in the trust.[7] In 1984, the fifty-nine counties outside the Chickasaw Cession received $75.34 per pupil and $42.00 per acre. *Chickasaw Cession Report* at 10. The percentage increase in income from school lands outside the Chickasaw Cession was 467 percent from 1978 to 1983, *Chickasaw Cession Report* at 3 (J.A. 37). This increase will, if anything, grow larger given the recent beginning of a serious effort by state officials to obtain at least an approximation of market value incomes from sixteenth sections still within the trust. *See Turney v. Marion County Board of Education*, No. 55,764 slip op. at 8-9, 19 (Miss.

[6] The Constitution of the State of Mississippi, requires such appropriations to be made by each annual session of the legislature. Miss. Const. art. VIII, § 212 (1890)(J.A. 65)

[7] The acreage figure and the number of pupils are given in *Chickasaw Cession Report* at 2, 10 (J.A. 36, 44).

Nov. 27, 1985)(holding sixteenth section leases for inadequate consideration are to be reformed to yield market value). The *Chickasaw Cession Report* states that a minimum of $7,000,000.00 per annum is required to put the Chickasaw Cession schools on a par with the school lands trust income received by the other fifty-nine counties. *Chickasaw Cession Report* at 3 (J.A. 37-38). The legislative goal of "equitable compensation" for the Chickasaw Cession for the loss of its trust fund will not be attained by the 1985 legislation.

SUMMARY OF THE ARGUMENT

This suit seeks enforcement of the federal school lands trust for the schools of Mississippi's Chickasaw Cession. The Chickasaw Cession school lands trust is breached annually by the state officials charged with the duties of trustee who refuse to pay income to the schools of the Chickasaw Cession commensurate with the obligations imposed by the trust. These state officials will continue to breach the trust in that manner unless enjoined. The issue *sub judice* is whether a federal court may enjoin continuing breaches of a federal school lands trust by state officials who: (1) Through their predecessors, gave away or converted to the use of the state over 177,000 acres of school lands conveyed in trust by the federal government to the state for the sole benefit of the Chickasaw Cession schools; (2) Themselves, continue to acknowledge the defalcations as well as their perpetual fiduciary duty to provide trust income commensurate with what would have accrued had there been no defalcations; (3) Despite such acknowledgments, themselves, continue to default on income payments annually, while providing a miniscule sum of money in the form of an annual appropriation in lieu of the trust income to which the Chickasaw Cession schools are entitled; and (4) Themselves, allow the entire income from school lands remaining in the state to be retained by the Mississippi Counties outside the Chickasaw Cession.

The federal school trusts were conceived by Congress as the basis for the creation and continued support of the public schools of each public land state. Federal school lands trusts began as and remain the corner-stone of the system of free public schools in a substantial majority of the states. *United States v. Morrison*, 240 U.S. 192, 198 n.1&2 (1915); *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 177 (1855). For these reasons these trusts constitute an area of high federal interest.

All federally-created school trusts are uniformly governed by federal law and share significant characteristics. The trusts exist perpetually, cannot be altered or abrogated by the states, and are for the sole benefit of the public schools. *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302-03 (1976); *Lassen v. Arizona*, 385 U.S 458, 462-463, 467 (1967). School lands trusts impose specific burdens and obligations on the states, as well as the state officials who act as trustees, which include preserving the corpus, maximizing income, and, where the corpus is lost or converted wrongfully, continuing the payment of appropriate income indefinitely. The obligations and duties, first imposed in the various federal statutes which created the trust, are further defined by the common-law. The grants—including the Chickasaw Cession grant—are enforceable in the same manner as common-law trusts: *See infra* § I(F). The federal courts have jurisdiction as well as the duty to require the public officials of Mississippi to carry out the school lands trust in accordance with its terms.

The school lands trust and land grants generally, are clearly contractual, as has long been recognized. *Andrus v. Utah*, 446 U.S. 500, 507 (1980); *Wood v. Lovett*, 313 U.S. 362, 369 (1941); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810).

The state officials' violation of the trust duties constitutes a violation of these contract obligationsThe only justifications or explanations offered for these breaches are (1) historical accident and (2) the structure of school fi-

nances. These excuses are neither a reasonable nor a necessary basis for the state's wrongful acts. The Chickasaw Cession schoolchildren are entitled to injunctive relief to prevent this indefensible conduct in the future.

The principal thrust of this lawsuit seeks an injunction to prevent state officials from continuing into the future their annual violations of their trustee duties. Such suits against state officials who violate federal law are authorized by *Ex parte Young*, 209 U.S. 123 (1908). Prospective injunctive relief to prohibit continuing violations of federal law in the future is sanctioned by *Edelman v. Jordan*, 415 U.S. 651 (1974). Such prospective relief is permissible even if it has an "ancillary effect on the state treasury." The Chickasaw Cession schoolchildren are clearly entitled to this *Edelman*-type relief.

Another aspect of the Complaint seeks relief of the nature approved in *Milliken v. Bradley*, 433 U.S. 267 (1977). Under *Milliken*, remedial programs to cure the present effects of past discrimination are permissible within the strictures of the eleventh amendment. Suffering a disadvantage similar to the schoolchildren in *Milliken*, the Chickasaw Cession schoolchildren are entitled to remedial programs to cure present effects of the continuing discrimination by state officials.

The discriminatory acts perpetuated by the state officials cannot survive the thorough analysis required by rational basis review as set forth by this Court in *Cleburne v. Cleburne Living Center*, ___ U.S. ___, 87 L.Ed.2d 313 (1985). The failure of the Fifth Circuit to make the analysis required by *Cleburne* led the Court into the erroneous conclusion that the discriminatory acts of the state officials have a rational basis. Performance of the required analysis demonstrates: (1) the Chickasaw Cession schoolchildren are victims of deliberate discriminatory acts by state officials who arbitrarily divide the schoolchildren of the state into two groups and deny those schoolchildren of the Chickasaw Cession school lands trust income; and (2) the discriminatory acts of the state officials deny the Chickasaw Cession schoolchildren minimally adequate education.

This case warrants intermediate scrutiny. The Fifth Circuit erroneously held that an absolute deprivation of all educational opportunities was prerequisite to the invocation of intermediate scrutiny on the theory that such was the rule in *Plyler*. Thus a partial discriminatory denial of educational opportunity so severe as to deprive schoolchildren of a minimally adequate education is said to pass constitutional muster. The discrimination imposed on the Chickasaw Cession schoolchildren is homologous with that in *Plyler v. Doe*, 457 U.S. 202 (1982) and altogether distinct from the funding differential issue described in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

ARGUMENT

I. THE FEDERALLY-CREATED SCHOOL LANDS TRUST IS ENFORCEABLE IN THE FEDERAL COURTS AGAINST STATE OFFICIALS WHO BREACH THEIR DUTIES AS TRUSTEE

A. The Chickasaw Cession Schoolchildren Have Stated A Claim Against State Officials For Their Continuing Breach Of The School Lands Trust

The state officials are committing a continuing breach of their duties as trustees of the Chickasaw Cession's federal school lands trust. This continuing breach began with the trustees' conversion of the entire trust corpus and continues with their present refusal to provide the schoolchildren of the Chickasaw Cession with the level of benefits commensurate with the obligations of the trust. Common law rules governing trusts recognize the wrongful nature of this conduct, as well as the trustee's duty to cease the continuing violation.

Common law trust principles proscribe the defalcations and continuing breaches that have occurred. Under federal common law principles, this Court has enforced school lands trusts in *Lassen* and *Alamo*. The Mississippi school lands trust is likewise enforceable because the Mississippi

trust, and all other public-land school trusts, partake of the same essential nature and proceed from the same fundamental principle. That all the school land trusts partake of the same nature is convincingly demonstrated by the legislative history of the school lands grants, the policy underlying all school lands trusts, and the prior holdings of this Court.

B. All School Lands Trusts Are Founded On The Same Fundamental Principle

Congress was following a fundamental policy of creating trusts for the purpose of encouraging and supporting public education when it created the school lands trust in Mississippi and other public-lands states:

> The practice of setting apart section no. 16 of every township of public lands, for the maintenance of public schools, is traceable to the ordinance of 1785, being the first enactment for the disposal by sale of the public lands in the western territory. The appropriation of public lands for that object became a *fundamental principle*, by the ordinance of 1787, which settled terms of *compact* between the people and States of the northwestern territory, and the original States, unalterable except by consent.

-*Cooper v. Roberts*, 59 U.S. (18 How.) 173, 177 (1855) (emphasis added); *see Andrus v. Utah*, 446 U.S. 500, 506 n.7 (1980)(citing Cooper); *United States v.Morrison*, 240 U.S. 192, 198 (1915)(same).

The Georgia Cession—which ceded to the United States the area that became Mississippi—and Mississippi's land sales and enabling acts embodied this fundamental principle by incorporating by reference the Ordinances of 1785 and 1787. Once announced in the Ordinances, this fundamental principle continued as the uniform policy and purpose structuring all subsequent school lands trusts.

> The first enactment for the sale of public lands in the western territory provided for setting apart section sixteen of every township for the maintenance of public schools (ordinance of 1785); *Cooper v. Roberts*, 18 How. 173, 177, 15 L.Ed. 338, 339; and *in carrying out this policy, grants were made for common-school purposes to each of the public-land states admitted to the Union*. Between the years 1802 and 1846 the grants were of every section sixteen and, thereafter, of sections sixteen and thirty-six. [footnotes omitted]

-*United States v. Morrison*, 240 U.S. 192, 198 (1916)(footnotes cite to grants for twenty-nine states) (emphasis added); *Andrus v. Utah*, 446 U.S. 500, 506 n.7 (1980)(quoting *Morrison*); *United States v. Wyoming*, 331 U.S. 440, 443 (1947)(same).

The homogeneity of the policy underlying the school lands trusts of the various states is in accord with the general federal "equal footing" policy to which specific reference is made in the enabling acts for states.

> [T]he cession by the State of Georgia to the United States in 1802 of territory including great part of Alabama and of Mississippi, each provided that the territory so ceded should be formed into states, to be admitted, on attaining a certain population, into the Union...(in the words of the Ordinance of Congress of July 13, 1787, for the government of the Northwest Territory, adopted in the Georgia cession) "on an equal footing with the original States in all respects whatever;"....

-*Shively v. Bowlby*, 152 U.S. 1, 26 (1894)(citing *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221-22 (1845)); *see also California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 281 n.9 (1982) (citing *Shively* and *Pollard* with approval).

Ervien v. United States, 251 U.S. 41 (1919), a school lands trust case, makes special mention of the "equal footing" doctrine indicating that interpretation of the school lands trust should receive a single interpretation for all states. 251 U.S. at 45; *see* 11 Annals of Cong. 1097-1100 (1851)(in

1802, while discussing the Northwestern Territory's admission to the Union, both equal footing and school lands trust principles are invoked).

The specific school lands trust provisions vary from state to state. The later grants contain more specific provisions. Despite this additional verbiage, even the later grants are not comprehensive statutes. *Cf. County of Oneida, New York v. Oneida Indian Nation*, ___ U.S. ___, 84 L.Ed.2d 169, 181 (1985)(trust "did not establish a comprehensive remedial plan for dealing with violations"). Given that none of the school lands statutes were comprehensive, this Court has held that the purpose underlying these grants, rather than the specific language of the grants, is the touchstone for construing the acts creating the trusts.

> The Act's silence obliges us to examine its purposes, as evidenced by its terms and its legislative history, to determine whether these restrictions should be imposed here.

-Lassen, 385 U.S. at 462-63 (construing Arizona's enabling act which was one of the most specific).

While non-comprehensive, each individual grant proceeded from the same underlying policy. Prior school land legislation, as the source for this grant, is an important index of its meaning. Later grants are an equally important index under the accepted rule of construction that subsequent legislation can be used to construe earlier legislation.[8] For example, the construction this Court placed on the school land grant in *Lassen v. Arizona* is equally applicable to the Mississippi school land grant.

This Court has recognized that both the earlier and later grants are of the same genre. *United States v. Wyoming*,

[8] *See Heckler v. Turner*, ___ U.S. ___, 84 L.Ed.2d 138, 156-57 (1985)(subsequent legislation carries "considerable retrospective weight"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 299-300 (1979)(subsequent legislation sheds "light on the intent"); *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)(subsequent legislation "entitled to significant weight"); *F.H.A. v. Darlington, Inc.*, 358 U.S. 84, 90 (1958)(subsequent legislation "entitled to weight").

331 U.S. at 451 (notes that the House Committee Report for the Wyoming Enabling Act, stated Wyoming would receive "the usual land grants"); *see* S. Rep. No. 185, 82d Cong., 1st Sess. at 708 (1951) (Mississippi and its Enabling Act included with 32 other public-land states in an appendix table entitled "Acts Containing Other Provisions Restricting Transfers Of Land To, Or Disposal By, The States"); S. Rep. 454, 61st Cong., 2d Sess. at 19 (1910)(more specific restrictions regarding school lands placed in New Mexico's and Arizona's Enabling Acts were "nothing new in principle"). The greater specificity of the later grants is only an additional prophylactic measure taken by Congress.

> To preclude any license of construction or liberties of inference it was declared that the disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should "be deemed a breach of trust."

-Ervien, 251 U.S. at 47.

In short, the specificity of the grant was simply a change aimed at preventing repetition of the rampant abuses of the past:

> All these restrictions in combination indicate Congress' concern both that the *grants* provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust.
>
> This is confirmed by the *background* and legislative history of the Enabling Act. The restrictions placed upon land *grants* to the States became steadily more rigid and specific in the 50 years prior to [Arizona's] Act, as Congress sought to require prudent management and thereby to preserve the usefulness of the *grants* for their intended purposes.

Lassen v. Arizona, 385 U.S. 458, 467, 468 (1967) (despite the fact that only *one grant* was at issue, the Court speaks of *all* grants)(emphasis added); *see Alamo*, 424 U.S. at 302 (quoting *Lassen*).

C. The Common Thread That Runs Through The Cases Construing Each Of These Grants Is A Clear Recognition of Enforceability

State officials are made to account for the discharge of their duties as trustees. This Court necessarily recognized this fact in enforcing the trusts in *Lassen* and *Alamo*.[9] Given that all school lands trust partake of the same nature, the particular provisions used by Congress to create a trust do not affect its enforceability. The Mississippi school lands trust is just as enforceable as the Arizona school lands trust enforced in *Lassen*.

The federal courts, applying federal law to construe the various acts of Congress creating the school lands trusts, have characterized these trusts as irrevocable compacts between the United States and the state for the benefit of the common schools. These trusts cannot altered or abrogated, and are enforceable much as common law trusts. In *Lassen*, this Court states with reference to the language in the Arizona enabling act:

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[9]Despite the wealth of authority heretofore cited demonstrating the existence and enforceability of the federal school lands trust, there is some language in *Alabama v. Schmidt*, 232 U.S. 168 (1914), which, in the lower courts, state officials contended was to the contrary. That language characterized the school lands trust as "honorary". 232 U.S. at 174. State officials take this "honorary" characterization to mean that the trust is unenforceable. This notion that "honorary"—as used in *Schmidt*—can be equated with unenforceability is erroneous. *See* S. Rep. No. 185, 82d Cong. 1st Sess. at 7 (1957)(Alabama and its Enabling Act included in appendix table entitled "Acts Containing Other Provisions Restricting Transfers Of Land To, Or Disposal By, The States"). This action is based upon a failure to distinguish between a state's honorary obligation to retain the specific school land granted instead of converting them to a trust fund, and a state's binding obligation to properly manage the overall assets of the trust regardless of their form.

> "Words more clearly designed. . .to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen." *United States v. Ervien*, 246 F. 277, 279. All these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only the beneficiaries profit from the trust.

385 U.S. at 468.

There is nothing to suggest that the Congress had less than this intent when it passed Mississippi's Enabling Act in 1817. In *United States v. Swope*, 16 F.2d 215 (8th Cir. 1926), the court, after characterizing the grant as an express trust, states:

> "The trust was imposed on New Mexico by the act of Congress, but the same rule of construction applies to both public and private grants. "The best construction of a statute is to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases. . . ."

16 F.2d at 217.

Throughout the years, the Mississippi Supreme Court has continued to declare that the compact between the United States and the State of Mississippi constitutes a valid, subsisting and enforceable trust, and has insisted upon its strict enforcement.[10] Other state courts, construing federal land grants, uniformly hold that valid, subsisting, and bind-

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[10]*See Bragg v. Carter*, 367 So. 2d 165, 167 (Miss. 1978) (school lands trust clearly enforceable); *Tally v. Board of Supervisors*, 323 So. 2d 547, 550 (Miss. 1975)(same); *Holmes v. Jones*, 318 So. 2d 865, 868 (Miss. 1975)(same); Keys v. Carter, 318 So. 2d 862, 864 (Miss. 1975)(same); *State ex rel. Kyle v. Dear*, 209 Miss. 268, 279-80, 46 So. 2d 100, 104 (1980)(same); *Koonce v. Board of Supervisors*, 202 Miss. 473, 478, 32 So. 2d 264, 265 (1941)(same).

ing trusts were created.[11] This Court should erase any doubt that may exist as to the nature, purpose, intent and obligations of the school land trusts.

D. The Claims Arising From These Federally-Created Trusts Are Federal Claims Governed By Federal Law

As suggested in *Lassen*, the issue whether the lands trusts are governed by federal law transcends this suit. It would defeat the purpose of Congress in creating the school lands trust to allow their enforcement to depend on the tender mercies of the states where the trusts exist. Beginning with the defalcation imposed on the Chickasaw Cession schoolchildren by Mississippi, continuing through the relatively innocent boondoggle described by this Court in *Lassen*, considering the 100,000 acre land grab attempted by Alaska described in *State v. Weiss*, 706 P.2d 681 (Alaska 1985), and going on through the 25 acre defalcation perpetrated by the State of Hawaii as described in *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216 (9th Cir. 1979), the state trustees seldom hesitate to ignore, misconstrue and violate the express terms of the federal land trusts by legislative fiat or otherwise.

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[11] Alaska: *State v. Weiss*, 706 P.2d 681, 683 (Alaska 1985)(enforcing federally-created mental health lands trust); *State v. University of Alaska*, 624 P.2d 807, 810 (Alaska 1981)(enforcing federally-created university lands trust); Arkansas: *Special School District No. 5 v. State*, 139 Ark. 263 213 S.W. 961, 962-64 (1941) (enforcing federally-created school lands trust); Arizona: *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336, 340, 346, 354 (1947) (enforcing federally-created school lands trust); Idaho: *Roach v. Goodling*, 11 Idaho 244, 81 P. 642, 644-45 (1905) (enforcing federally-created college lands trust); Nebraska: *State v. Rosenberger*, 183 Neb. 726, 193 N.W.2d 769, 773 (1972) (enforcing federally-created school lands trust); North Dakota: *State Highway Commission v. State*, 70 N.D. 673, 297 N.W. 194, 195-96 (1941) (enforcing federally-created school lands trust); Oklahoma: *Oklahoma Education Association v. Nigh*, 642 P.2d 230, 235-36 (Okla. 1982) (enforcing federally-created school lands trust); Utah: *Duchesne v. State Tax Commission*, 1040 Utah 365, 140 P.2d 335, 337-38 (1943) (enforcing federally-created school lands trust).

It must be remembered that a school land grant is a "solemn agreement"[12] and "compact"[13] between the state and the federal government. Having this nascence, and considering the alternative, the trust is necessarily a creature of federal law.[14]

> Although the terms of these grants differ, at least the most recent commonly make clear that the United States has a continuing interest in the administration of both the lands and the funds which derive from them.
>
> *-Lassen v. Arizona*, 385 U.S. 458, 460 (1967).

In a recent decision by a court of appeals on this issue, the Ninth Circuit determined federal law governed rights in the land trust for native Hawaiians incorporated in the Admission or Enabling Act for the State of Hawaii:

> While the management and disposition of the home lands was given over to the state of Hawaii with the incorporation of the Commission Act into the state constitution, the trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law, *see Keau-*

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[12] As *Andrus v. Utah* correctly emphasizes, "the school land grant was a 'solemn agreement' which in some ways may be analogized to a contract between private parties." 446 U.S. at 507-08 (also speaks of "as is typical of private contract remedies");

[13] *See United States v. Morrison*, 240 U.S. at 201 (school land grant part of a "compact"); *Cooper v. Roberts* 59 U.S. (18 How.) at 178, 181 (same).

[14] *See Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 301 (1976)(quoting *Lassen* regarding the continuing interest in the federal school lands trust); *United States v. Swope*, 16 F.2d 215, 217 (8th Cir. 1926)(federal government imposed the school lands trust upon the state); *State v. Weiss*, 706 P.2d 681, 683 (Alaska 1985)(federally imposed trust governed by federal trust law); *Oklahoma Educational Association, Inc. v. Nigh*, 642 P.2d 230, 235-36 (Okla. 1982)(state legislature powerless to alter obligations under federal trust); *State v. University of Alaska*, 624 P.2d 807, 810-11 (Alaska 1981)(federal trust enforced by federal law).

> *kaha I*, 588 F.2d at 1218. Congress imposed the trust obligation as a condition of statehood and as a 'compact with the United States.' § 4, 73 Stat. 4. In *Pennhurst*, the right relied on was created completely by state law and only by state law.

Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 F.2d 1467, 1472 (9th Cir. 1984); *cf*: *Barnes v. Cohen*, 749 F.2d 1009, 1018)(3d Cir. 1984) (where both federal and state law are being violated a federal court can enjoin both violations).

E. The Federal Law Of Trusts Proscribes The State Officials Continuing Misconduct As Trustees

Common law rules of construction applied to private trusts are applied to the public school lands trust. *United States v. Swope*, 16 F.2d 215, 217 (8th Cir. 1926). Common law rules of trust law have been applied to federal lands trusts in various contexts. *See County of Oneida, New York v. Oneida Indian Nations*, ___ U.S. ___, 84 L.Ed.2d 169, 178-180, 181, 186-187 (1985)(applying common law remedies in action under Non-Intercourse Act of 1793 because the act did not establish comprehensive remedial plan).

The common law rule that trustees are prohibited from giving away, appropriating to their own use, or otherwise disposing of the corpus of a trust in derogation of the rights of the beneficiaries applies to the school lands trust.[15] One important corollary of the rule is the continuing nature of the trustee's duty to pay income to the beneficiaries once such a defalcation occurs. Where a reasonable

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[15]*See State v. Weiss*, 706 P.2d 681, 683 (Alaska 1985)(relying on *Restatement (Second) of Trusts* (1959) when protecting a federally-created land trust); *State v. University of Alaska*, 624 P.2d 807, 813 (Alaska 1981)(relying on Scott, *The Law of Trusts*, (3d ed. 1967) and Bogert, *The Law of Trusts and Trustees* (rev. 2d ed. 1978) when protecting a federally-created land trust); *Holmes v. Jones*, 318 So. 2d 865, 868-69 (Miss. 1975)(same).

yield is prevented by the trustee's wrongful conduct, the trustee has a continuing duty to produce a reasonable yield. Bogert, *Trusts & Trustees* § 703 (2d rev.ed. 1982). The defaulting trustee and its agents have "pocketed" the corpus of the Chickasaw Cession trust. The continuing duty of these trustees simply requires them to pay for what they hold in their pockets. 4 Pomeroy's Equity Jurisprudence §§ 1067, 1080 (5th ed. 1941); *Restatement (Second) of Trusts* § 74 comment c (1959). They are not allowed to avoid the duty to pay because the defalcation occurred in the past. IV Scott, *The Law of Trusts* § 392 (3d ed. 1967). The continuing duty to pay a reasonable yield remains. A failure to pay such a yield is a present breach of fiduciary duty.

Unless a clear and unequivocal repudiation of the trust is exhibited by the trustee, this continuing duty does not abate nor do limitations run against a beneficiary's right to recover against the trustee. Mere mismanagement will not constitute such a repudiation. *See Benedict v. New York*, 250 U.S. 321, 327 (1918)(no limitations until repudiation); *Gisborn v. Charter Oak Life Insurance Co.*, 142 U.S. 326, 337-38 (1892)(same); *Loring v. Palmer*, 118 U.S. 321, 344-46 (1885)(only "actual abandonment" of trustee's duties would cause beneficiaries' claim to abate or be subject to limitations); *Phillippi v. Phillipe*, 115 U.S. 151, 159 (1884)("lapse of time can constitute no bar to relief"); *Lewis v. Hawkins*, 90 U.S. (23 Wall.) 119, 126 (1874)("The relation once established is presumed to continue unless a distinct denial...[is] clearly shown"); *Nemkov v. O'Hare Chicago Corp.*, 592 F.2d 351, 356 (7th Cir. 1979)(citing *Lewis v. Hawkins*).

In this suit, state officials, acting as trustees, committed an act of defalcation when they gave away the remainder interest in the Chickasaw Cession lieu lands. *See* 1854 Miss. Laws 348 ch. CCXVII, § 2(J.A. 84). A further defalcation occurred when the trustees loaned a substantial part of the proceeds of the sales of the leases and of the lieu lands to various enterprises to use in the building of the railroads. 1856 Miss. Laws 141 ch. LVI, §§ 1, 14 (J.A.

87, 91). Another defalcation occurred when the trustees acquiesced in the appropriation of the balance of the trust fund into the general funds of the state where they were "subject to the general appropriation, by law, from the treasurer, or otherwise to be used by the state, in the same manner as the moneys received into the state from the ordinary sources of revenue." 1856 Miss. Laws 141 ch. LVI §§ 1, 14 (J.A. 87, 91).[16] From the instant these wrongful acts occurred, the state and its officials became trustees *de son tort*. That these defalcations occurred in the distant past detracts not an iota from the obligations of the trustees. This is so because the state has never repudiated the trust but rather it has continued to recognize its obligation to pay income to the Chickasaw Cession schools to the present day.

Thus, while the state officials and the state have repeatedly acknowledged their continuing trust obligations, the duties imposed by the trust have continued to be breached on an annual basis. By refusing to pay income to the beneficiaries in any way commensurate with the size of the converted corpus, or comparable with the trust income enjoyed by the counties whose sixteenth section land was not converted by the state, the trust is breached.

At least one of the state officials has candidly confessed that he and the state are guilty as charged in the complaint filed in this suit. In November, 1984, while this suit was

[16]According to the report, in 1856, the state converted to its own use part of the $1,047,330.00 received for 174,555 acres of Chickasaw Cession lieu lands between 1848 and 1856, which until that point had been held in trust by the state. In 1860, the state completed the conversion of the balance of the fund which had been loaned to certain enterprises that had promised to build railroads. Most of the Chickasaw Cession lieu land was in the Mississippi Delta, where exists some of the richest farm land in the world. To arrive at some concept of the present value of the property, without departing from the record, Bolivar County, where a substantial part of the lieu land was located, realized income of $94.25 per acre for its sixteenth section land in fiscal year 1983, while the Chickasaw Cession counties were paid 36¢ per acre in lieu of income for the purloined lieu lands. *Chickasaw Cession Report* at 2 (J.A. 36).

pending in the Fifth Circuit, Richard Molpus, Mississippi's Secretary of State and a defendant in this suit,[17] and Ray Mabus, Mississippi's State Auditor, prepared a special report on the Chickasaw Cession School Districts. *Chickasaw Cession Report* (J.A. 34). Comparing the sixteenth section receipts in the fifty-nine counties having school lands with payments to the counties in the Chickasaw Cession for the 1983 fiscal year, the report concluded with this finding:

> If a similar level of support were available to the Chickasaw Cession counties as was available to the average sixteenth section area counties, over $7,000,000.00 in additional funding would be needed. Raising the per acre proceeds to the sixteenth section per acre average of $42.00 would cost $7,022,502.00. Employing a similar methodology to the per student shortfall would cost $7,408,468.00.
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> -*Chickasaw Cession Report* at 3 (J.A. 38).

It is the continuing and recurring breach of trust, as measured by one of the principal state officials, for which relief is sought in this suit.

In its 1985 session, the Mississippi Legislature, while this suit was before the Fifth Circuit, attempted to respond to the realities of the state's defalcations for the first time since the 1890 Constitution. 1985 Miss. Laws 27 ch. XXIII, § 1. The act piously recites: "It is the intent of the Legislature to increase the annual appropriations to the Chickasaw Counties in order to equitably compensate them for each acre of Sixteenth Section Land which they have lost through sale by the state". 1985 Miss. Laws 27 ch. XXIII, § 2 (J.A. 97). However, the act demonstrates on its face that it will never accomplish its aim. For the fiscal year 1985-1986, the statute appropriates an additional $1,000,000.00 for the Chickasaw Cession Schools. By the provisions of the act itself (which provides for an appro-

[17]The Secretary of State is charged with the administration of the school lands trust.

priation of $5,000,000.00 in fiscal year 1989-1990),[18] the appropriation begins $4,000,000.00 per annum short of the trust income to which the legislation itself admits Chickasaw Cession schools are entitled. Accepting the even more candid admissions of Secretary of State Molpus, the initial shortage is $6,000,000.00 per annum.

Considered in the light of the total lack of response by the trustees of the school lands trust to the plight of the Chickasaw Cession schools for over 130 years, the token effort just described is important to this suit in only one respect. By legislative act, the State of Mississippi has admitted its obligation to provide the Chickasaw Cession schoolchildren with trust income commensurate to the school lands trust income enjoyed by the remaining fifty-nine counties in the state. But the same legislation demonstrates the continuing failure and refusal to comply with the obligations of the trust. The need for the relief sought in this suit is thus underscored.

II. WITHOUT REASON OR NECESSITY, STATE OFFICIALS COMMIT A CONTINUING BREACH OF CONTRACT OBLIGATIONS IMPOSED BY THE FEDERAL SCHOOL LANDS TRUST COMPACT

A. State Officials Have Impaired The Contractual Obligations They Owe To The Chickasaw Cession Schoolchildren.

The schoolchildren of the Chickasaw Cession are the intended beneficiaries of a promise by the State of Mississippi to maintain the school lands trust. As with other public-land states, the United States agreed to fund the school lands trust in Mississippi in exchange for return promises by the State that included an agreement not to tax public lands for five years after sale. *See supra* note 3 and accompanying text. As with other types of trusts, the state officials, by undertaking the duties of trustee,

[18] This is a goal to be reached only if the 1989 legislature chooses to make the appropriation, which it is in no way bound to do.

promised the grantor (the United States) and the beneficiaries (the schoolchildren) to fulfill the legal obligations of a trustee. *See supra* § I(E). This contract obligation and its breach by the state officials forms the basis of the claim under the contracts clause of the United States Constitution in this case.

The contract here originates in a grant of lands by the United States. The contractual nature of land grants has long been recognized. *Wood v. Lovett*, 313 U.S. 362, 369 (1941); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810). The contractual nature of the school lands trust is equally well-recognized. As long ago as 1855, this Court characterized the school land grant to Michigan as a "compact" between Michigan and the United States. *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 176 (1855). In *Andrus v. Utah*, 446 U.S. 500 (1980), this Court noted that "[T]he school land grant was a 'solemn agreement' which in some ways may be analogized to a contract between private parties." *Andrus*, 446 U.S. at 507.

State officials agreed to undertake the duties of trustee as defined by the laws of trust, and then breached those duties. *See supra* § I(E). These duties imposed on the State by common law rules defining the duties of trustee are obligations protected by the contracts clause. The "obligations of contract" include the relevant rules of law that govern the terms of the grant. *Wood*, 313 U.S. at 370; *see United States Trust Co. v. New Jersey*, 431 U.S. 1, 20 n.17 (1977)("The obligations of a contract long have been regarded as including . . . law pertaining to interpretation and enforcement . . . as if they were expressly referred to or incorporated in its terms").

As defaulting trustees, the state officials are under a continuing duty to provide the trust with an income equivalent to that which it would receive if the trust's corpus were whole. *See supra* § I(E). The continuing failure of the state officials to provide the schoolchildren as beneficiaries with such an income is, and will continue to be, a substantial impairment of the contractual obligations of

the State of Mississippi. This "partial" impairment[19] is a substantial one. Having no corpus, the Chickasaw Cession counties receive no income from the trust and receive payments in lieu of income that are a fraction of the income received in the counties outside the cession. These conditions exist because of the state officials' disregard of their continuing duties to the trust and its beneficiaries.

B. The Impairment By State Officials Of Their Contractual Obligations Is Not "Reasonable and Necessary"

Where the State has impaired obligations of contract, the legislation must be "prompted by. . .[a] significant and legitimate state interest" to escape the prohibition of the contract clause. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983). This means the state must show the reasonableness and necessity of the impairment:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is *reasonable and necessary* to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised.
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> -*United States Trust Co.*, 431 U.S. at 25-26 (emphasis added and footnotes omitted); *see also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 243-44 (1978)(citing *United States Trust Co.*

[19]It matters not whether this Court considers the breach a total impairment, or—because of the pittance being doled out to the Cession's schools—a partial impairment. Partial impairments of contract obligations violate the prohibition of the clause just as total impairments. *United States Trust Co.*, 431 U.S. at 26-27.

> for the "reasonable and necessary" principle as well as "more stringent examination" for a state's own contract).

To decide whether the "legitimate state interest" test is met, the court first examines the purpose of the legislation to determine whether it serves an important public purpose. If an important public purpose is discerned, the court then examines whether the means chosen are "reasonable and necessary" to accomplishment of the purpose. *United States Trust Co.*, 431 U.S at 26; *see Energy Reserves*, 459 U.S. at 416-417 (applying two-part analysis of purpose). When the state itself is a party to the contract, a "stricter standard" applies. *Energy Reserves*, 459 U.S at 412 n.14. The Court noted that with at least one type of contract—state financial obligations—this stricter standard is nearly always fatal to a state's impairment of contract:

> When a state itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets. *See United States Trust Co.*, 431 U.S. at 25-28; *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *Murray v. Charleston*, 96 U.S 432 (1878). *But see Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942).
>
> -*Energy Reserves*, 459 U.S. at 412 n.14.

The lower court advanced two explanations for Mississippi State officials' conduct. One was that the "income difference is attributed to historical fact[s]" for which the state has made a partial remedy. *Papasan*, 756 F.2d at 1095 (P.A. A-30-31).[20] It is clear, however, that the income difference is attributable solely to the state officials' breach of their duty to provide the trust with a reasonable income. *See supra* § 1(E). Neither historical occurrences involved

[20]These justifications were stated in terms of rational bases in response to the equal protection claim.

in this case nor the mere passage of time since the beginning of the breaches excuse the continuing breach by the state officials.[21] A continuing failure to give the Chickasaw Cession schoolchildren the benefits of a properly managed trust cannot be a "reasonable and necessary" response to an "important public purpose" when the "purpose" is simply to excuse state officials who have frittered away the corpus of the trust. A state is not free to rewrite the terms of its contracts to suit economic convenience:

> If a state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. [footnote omitted]
>
> -*United States Trust Co.*, 431 U.S. at 26.

The second purported rationale noted by the Fifth Circuit for the state officials' conduct is that of Mississippi's "structure of school finances." *Papasan*, 756 F.2d at 1095 (J.A. 30). The Fifth Circuit stated that:

> With land values as a base and desired local administration of local schools, income differences are inevitable.
>
> -*Papasan*, 756 F.2d at 1095. (P.A. A-30)

These assertions regarding the structure of Mississippi school finances are factually incorrect[22] for several reasons. The state officials have always exercised direct and complete control over the Chickasaw Cessions' school lands. Although some aspects of sixteenth section land management are delegated locally outside the Chickasaw Cession, no aspect of school lands administration in the Chickasaw Cession has ever been performed locally. In fact, the officials failed to obtain consent for their actions from any local school officials or the trust beneficiaries, even though such consent was expressly required by Congress. 10 Stat. 6 ch. XXXV (1852)(J.A. 63). There is thus no factual basis for assertion that "local control by local schools" provides any sort of justification for the impairment of contractual obligation in this case. There is no facially-neutral, homogeneous school finance structure in Mississippi to be protected. These assertions regarding the structure of Mississippi school finances amount to no more than a circular argument: the irrational discrimination against the Chickasaw counties should be permissible so that an overall system of school financing which is irrationally discriminatory against the Chickasaw counties may be maintained.

Even if a non-specious rationale could be imagined, the "reasonable and necessary" requirement, in this context of school lands trusts, places an extremely heavy burden upon state officials to justify impairment of the contractual obligations. Proper maintenance of the school lands trust is, in and of itself, a "vital interest" for a state. *United States Trust Co.*, 431 U.S. at 31; *see also El Paso v. Simmons*, 379 U.S. 497, 498, 509 (1965) (protection of the school lands trust was of such a high priority as to constitute a "reasonable and necessary" basis for a state to alter other contractual obligations). State officials are thus in the precarious position of trying to show that mismanagement and improper maintenance of the school lands trust is "more reasonable and necessary" than is proper maintenance of the school lands trust. This continuing breach by the state officials of their contract duties is neither reasonable nor necessary. The schoolchildren of the Chickasaw Cession are entitled to prospective, injunctive relief from this improper conduct.

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[21] It has been repeatedly held that the passage of time in the form of limitations periods does not provide a defense to this continuing duty. *See supra* § I(E).

[22] It also fails as a matter of logic: How can land values be a "base" when the Chickasaw Cession Counties have no school lands?

III. PROSPECTIVE INJUNCTIVE RELIEF TO PREVENT STATE OFFICIALS FROM CONTINUING TO DEPRIVE THE CHICKASAW CESSION SCHOOL CHILDREN OF THE BENEFITS AFFORDED ALL OTHER MISSISSIPPI SCHOOL CHILDREN BY THE FEDERALLY-CREATED SCHOOL LANDS TRUST IS NOT BARRED BY THE ELEVENTH AMENDMENT

A. This Suit For Violations Of Federal Constitutional And Statutory Rights Seeks Prospective Injunctive And Remedial Relief

State officials have breached their obligations to the Chickasaw Cession schoolchildren, and continue to breach these obligations on an annual basis. To this claim of injury the Fifth Circuit responded:

> Assuming that a binding federal compact was created and breached over a century ago, the federal courts have no jurisdiction to address the breach, given the nature of the relief sought.
>
> *-Papasan*, 756 F.2d at 1094 (P.A. A-23-24).

The Fifth Circuit refused to enjoin future breaches of the trust created by federal statutes and governed by federal law[23] on the theory the initial breach occurred in the past, prohibition of future breaches might involve the expenditure of state funds, and certain of the obligations of defendants were defined by state, not federal, law.

The analysis of an ordinary eleventh amendment issue is two-fold: First, the court examines whether the suit itself can be brought, a question answered by applying the standard of *Ex parte Young*, 209 U.S. 123 (1908) and its progeny; and second, the court examines whether the relief sought is permitted by the amendment, a question answered by applying the standards of *Edelman v. Jordan*, 415 U.S. 651 (1974) and its progeny. The pertinent decisions of this Court demonstrate that federal courts can enforce the obligations and secure the benefits of the trust within the strictures of the eleventh amendment.

[23]We have demonstrated that the obligations and benefits of this trust are governed by federal law. *See supra* § I(D).

Two distinct types of relief are sought here: First, the basic relief afforded by an injunction prohibiting the state officials from continuing to violate their fiduciary duties in the future, and second, the full relief afforded by an order such as that in *Milliken v. Bradley*, 433 U.S. 267 (1977), requiring funding of remedial programs to cure the on-going effect of the denial of a minimally adequate education.

B. Federal Courts Have Jurisdiction To Hear Suits Based On Action By State Officials That Violate Federal Statutes Or The Federal Constitution

Since *Ex parte Young*, 209 U.S. 123 (1908), it has been clear that actions by state officials that violate federal law are *not given* eleventh amendment immunity. *Scheuer v. Rhodes*, 416 U.S 232, 237 (1970). "Federal law" includes not only the Constitution but also federal statutes.[24] Thus, in *Edelman*, 415 U.S. at 664, this Court did not interfere with the prospective, injunctive portions of relief granted on the claim for violation of federal statutes governing welfare benefits. *See Quern v. Jordan*, 440 U.S. 332, 349 (1978)(subsequent appeal of *Edelman* upholding notice relief under same welfare statutes); *Coalition for Basic Human Needs v. King, et al.*, 654 F.2d 838, 842 (1st Cir. 1981)(upholding relief for the same violation of the same statutes).

[24]While Milliken involved formulating the remedy for a constitutional violation, there is no suggestion in the opinion that the relief as formulated is limited to constitutional violations. *Coalition for Basic Human Services v. King*, 654 F.2d 838, 842 (1st Cir. 1981) states: "Nor do we think, under the plain language of *Edelman* and *Milliken*, that it is important that the substantial federal question involved here is statutory rather than constitutional."

C. Federal Courts Have Jurisdiction To Enjoin Continuing Violations Of Federal Law By State Officials Despite The Possibility Of An Ancillary Effect On A State's Treasury

The principal thrust of the Complaint is that state officials be enjoined to cease their future annual violations of the duties imposed on them by federal statutes as trustees of the school lands trust. *Edelman* teaches that the fact such an injunction might have a future ancillary effect on the state treasury does not produce an eleventh amendment bar. *Edelman* uses other welfare cases as examples of permissible "ancillary effect[s] on the state treasury." The Court noted two other cases where the state was enjoined from denying welfare benefits for certain claimants, one on equal protection grounds, the other on due process grounds. *See Edelman v. Jordan*, 415 U.S. at 667-68 (noting *Graham v. Richardson*, 403 U.S. 365 (1971); and *Goldberg v. Kelly*, 397 U.S. 254 (1970)). In both cases, the state officials, in order to comply with the decree, "would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct." *Edelman*, 415 U.S. at 668. This, the Court held, was "an ancillary effect on the state treasury [that] is a permissible and often inevitable consequence of the principle announced in *Ex parte Young*." *Edelman*, 415 U.S. at 668.

In this suit, the Fifth Circuit reasoned that any rights otherwise afforded by the school lands trust are eleventh amendment barred because "the relief sought here 'requires the payment of state funds, not as a necessary consequence of compliance in the future with substantive federal question determination, but as a form of compensation'. . .for legal breaches which occurred more than one hundred and fifty years ago." *Papasan*, 756 F.2d at 1094 (citing *Edelman*, 415 U.S. 668) (P.A.A-26). This reasoning completely ignores the allegations of the Complaint: The state officials, charged with the continuing duty of carrying out the obligations of school lands trustee, refuse to adhere to the stated purposes of the school lands trust.

Complaint ¶45 (J.A. 17-18). No part of the trust income is distributed to Chickasaw Cession schools. The pittance provided to Chickasaw Cession Schools, "in lieu of" trust income, is a fraction of the income enjoyed by schools outside the Chickasaw Cession. At no time since the trust was breached initially have the Chickasaw Cession counties enjoyed income commensurate with what would have been forthcoming had the state initially not breached its trust obligations. Having breached the trust, state officials continue to refuse to the present day to provide the schools of the Chickasaw Cession with trust income commensurate with trust obligations. This is nothing less than a continuing breach of trust obligations. The injunctive relief sought for this violation of the trust is entirely prospective: Comply in the future with the trust obligations assumed by virtue of the school lands trust by providing Chickasaw Cession schools with trust income commensurate with the obligations imposed by the trust.

As recently as December 3, 1985, this Court stated the eleventh amendment is no bar to prospective injunctive relief predicated upon wrongful acts which will continue in the future unless enjoined:

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. See *Pennhurst, supra* at 102. See also *Milliken v. Bradley*, 433 U.S. 267 (1977). But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.
>
> *-Green v. Mansour*, ___ U.S. ___, 85 L.Ed.2d 158 (1985).

D. The Eleventh Amendment Permits Relief In The Form Of Remedial Programs To Correct The Present Effect Of A Continuing Deprivation Suffered By The Chickasaw Cession Schoolchildren

In *Milliken v. Bradley*, 433 U.S. 267 (1977), the Court affirmed an award of four remedial programs to cure the effects on black students of an equal protection violation. The costs of these programs "was to be equally borne by the Detroit School Board and the State." *Milliken*, 433 U.S. at 277. The only relief awarded against the state was that it pay one-half of these costs. The state argued that the eleventh amendment shielded it from an order to fund the remedial program. The Court held this relief to be permissible under the eleventh amendment. 433 U.S. at 289-90. The Court noted that in *Edelman*, 415 U.S. at 663-64, the improper relief "sought 'the award of an *accrued* monetary liability. . .' which represented 'retroactive payments.' " *Milliken*, 433 U.S. at 289 (quoting *Edelman*, 415 U.S. at 663-64)(omission in original). In contrast, stated this Court, a suit is "proper to the extent it sought 'payment of the state funds. . .as a necessary consequence of compliance *in the future* with a substantive federal-question determination. . . .' " *Milliken*, 433 U.S. at 289 (citing *Edelman*, 415 U.S. at 668) (omission in original). Thus it was held that the relief ordered—that the state *pay money* in the future *to remedy a "substantive federal question determination"*—was permissible. *Milliken*, 433 U.S. at 289-90 (citing *Edelman*, 415 U.S. at 667). By analogy, the court may determine that prohibitions of future violations of the school lands trust, while incidentally affording additional trust income to the Chickasaw Cession schools in the future, will not remedy the denial of a minimally adequate education. In that case, the court has jurisdiction to require the payment of additional sums to fund a remedial program.

In *Milliken*, the Court spoke of a "minimal quality educational program". *See Milliken*, 433 U.S. at 291-292 (Marshall, J. concurring). There exists in the Chickasaw

Cession a substantial group of school children who are deprived of a "minimally adequate education." Complaint ¶ 2, 55 (J.A. 2, 21-22). While school segregation was the cause of the deprivation in *Milliken*, discriminatory disbursement of trust income is the cause here. Complaint ¶ 51-56 (J.A. 20-22).

Thus it is important to note that the *Edelman*-type injunctive relief requested does not probe the outer limits of *Milliken*, and that relief can be afforded without doing so. Should the court go no further than to require the state officials to comply in the future with their continuing duties under the school lands trust, any effect on the state treasury is ancillary to such an injunction and clearly does not run afoul of the eleventh amendment. Only in the event the court agrees that the state should be made to fund a remedial program, designed to bring up the standards of the Chickasaw Cession schools to those in the rest of the state, will true *Milliken* relief be involved.

The *Milliken*-type relief we seek will not "wipe the slate clean by one bold stroke", as would a retroactive award as proscribed by *Edelman*. *Milliken*, 433 U.S. at 290. As in *Milliken*, the remedial relief sought involves"no monetary award. . .to the members of [the] class. This case simply does not involve a raid on the State treasury. . . ." *Milliken*, 435 U.S. at 290 n.22. This is an action by public officials and beneficiaries of a public trust created by federal law and in an area of high federal interest. It is not an action that will line the pockets of the individual litigants should they prevail—it will benefit the public generally. The continuing violations of federal law, as well as the effect those violations have imposed on the schoolchildren of the Chickasaw Cession, justify relief in addition to the prohibition of future trust violations.

IV. THE DISCRIMINATION IMPOSED ON THE CHICKASAW CESSION SCHOOLCHILDREN IS NOT RATIONALLY RELATED TO A LEGITIMATE PURPOSE

A. Application Of Low Scrutiny Does Not Preempt A Detailed Examination Of The Conduct Of State Officials

Discriminatory deprivations of educational opportunity require, at the least, a rational basis before they can be justified.

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike.
>
> [. . . .]
>
> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.
>
> *-Cleburne v. Cleburne Living Center*, ___ U.S. ___, 87 L.Ed.2d 313, 320 (1985).

In *Papasan*, the Fifth Circuit's analysis of the rational basis for discrimination against the Chickasaw Cession schoolchildren is so superficial as to amount to no analysis at all.

> Plaintiffs' argument is then by necessity, that their receipt of less school lands money than that received by southern counties reduces the quality of education below that provided children in non-Chickasaw Cession districts. . . .a difference is not a denial of equal protection unless it lacks a rational basis. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98 S.Ct. 1278, 36 L.Ed.2d 16 (1973). That rationality is found in the state's structure of school finances. With land values as a base and desired local administration of local schools, income differences are inevitable.
>
> *-Papasan*, 756 F.2d at 1095. (P.A. A-29-30)

The Fifth Circuit did not delve into the facts underlying the Chickasaw Cession schoolchildren's claim detailed in the Complaint. Thus, the Fifth Circuit ignored the method this Court has prescribed for undertaking rational basis review.

Rational basis analysis is demonstrated in the recent cases of: *Cleburne v. Cleburne Living Center*, ___ U.S. ___, 87 L.Ed.2d 313 (1985); *Hooper v. Bernalillo County Assessor*, ___ U.S. ___, 86 L.Ed.2d 487 (1985); *Williams v. Vermont*, ___ U.S. ___, 86 L.Ed.2d 11 (1985); *Zobel v. Williams*, 457 U.S 55 (1982). In these cases the Court thoroughly analyzes each facet of the challenged governmental conduct and considers how such conduct interfaces with, and affects, the offended citizens. Thus, the approach is to require a complete articulation of the discrimination and its effects. The thoroughness employed does not vary with the level of scrutiny (strict/intermediate/low). Differences in levels of scrutiny determine only how far behind a government's justification for a discrimination a court will inquire, and not whether a court will bother to articulate a cogent picture of the discrimination. *See Cleburne*, 87 L.Ed.2d at 317-19, 325-27 (scrutiny focuses upon the proposed "purpose" to be served); *Williams v. Vermont*, 86 L.Ed.2d at 19 (same); *Zobel v. Williams*, 457 U.S. 55, 60 (1982)(same).

Cleburne v. Cleburne Living Center is illustrative of the articulation that must be performed of a challenged discrimination. In *Cleburne*, a city zoning ordinance prevented the establishment of an intermediate care facility for the mentally retarded. After thoroughly articulating the discrimination, the Court then subjected the asserted rational bases to low scrutiny review.

Two things are evident about rational basis review from *Cleburne*: (1) that a thorough articulation of the discrim-

ination must be performed so that proper evaluation of the rationality of each asserted basis may be made; (2) that, while only rationality will be required of a law that has a legitimate purpose, the government's asserted bases will not be accepted as rational on mere faith.

> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.
>
> *-Cleburne*, 87 L.Ed.2d at 3214 (citing *Zobel v. Williams*, 457 U.S 55, 61-63 (1982))

The question which the respondent trustees must address is: what justification is there for a refusal to cease discriminating against the Chickasaw Cession schoolchildren?

B. There Is No Rational Basis For The Discrimination Against The Chickasaw Cession Schoolchildren

The Fifth Circuit's cursory treatment of the discrimination experienced by the Chickasaw Cession schoolchildren demonstrates its misunderstanding of the workings of Mississippi's school finance structure. Neither the desire for local administration of local schools, nor differences in local land values, are the bases of the discrimination which exists here for the following three reasons:

> (1) the Fifth Circuit stated that the Chickasaw Cession schools receive "less" school lands money when, in fact, the twenty-three counties in the Chickasaw Cession receive no school lands trust income at all, but only a pittance appropriation in lieu of such income.
>
> (2) the Fifth Circuit postulated that school lands trust income was predicated on differences in land values in different counties. But land values cannot be the "base" for determination of income from the school lands trust because the Chickasaw Cession counties have neither school lands to use as a base, nor a trust fund to manage and invest.

> (3) the Fifth Circuit indicates that there is a uniform statewide system delegating the administration of school lands to local school boards. But there is no such single uniform system. There is instead a bifurcated discriminatory system. While the state officials delegate their land management duties imposed by the trust to local school boards in the fifty-nine counties outside the Chickasaw Cession, there are no trust lands to manage in the Chickasaw Cession and the Chickasaw Cession school boards are given no voice whatsoever in the "management" of the mythical corpus constituting their share of the trust.

The Fifth Circuit assumed that the difference between the income received from the school lands trust by the non-Chickasaw Cession schools, and the pittance appropriation received by the Chickasaw Cession schools, is the result of pure happenstance as in *Rodriguez* rather than the result of the trust violations on the part of the state officials. As explained heretofore, the deprivation suffered by the Chickasaw Cession schoolchildren is not the result of happenstance, but rather the result of purposeful discrimination.[25] Once the discrimination against the Chickasaw Cession schoolchildren is articulated and understood, it is apparent that this discrimination cannot be rationally related to any legitimate purpose. The invidious discrimination, in fact, serves no purpose whatsoever, but rather is a result of state officials ignoring their fiduciary duties as trustees under the federal school lands trust. The deprivation suffered by the Chickasaw Cession schoolchildren is so egregious and so lacking in rational basis that even under low scrutiny the conduct by Mississippi state officials must be held to violate the equal protection clause.

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[25]The two excuses for the discrimination discussed in the Fifth Circuit opinion—"land value as a base" and "historical accident"—have been previously discussed and demonstrated to be not rationally related and downright non-sequitur. *See supra* §II(B).

C. Though This Court Has Not Expressly Announced A Test For When Intermediate Review Is Available In The Educational Context, An Overall Method Of Analysis Is Apparent

It is common practice for this Court to eschew addressing broader constitutional issues if challenged governmental regulation can be invalidated under rational basis review. *Williams v. Vermont*, ___ U.S. ___, 86 L.Ed.2d 11, 22 (1985)(narrow holding not addressing broader constitutional challenges). The discrimination against the Chickasaw Cession schoolchildren could be resolved under this common practice. However, in the unlikely event this Court does not strike down under rational basis review the discriminatory conduct by Mississippi state officials, petitioners seek a determination that the discrimination they suffer warrants intermediate scrutiny.

In *Plyler v. Doe*, 457 U.S. 202 (1982), this Court held that a discriminatory absolute denial to a free public education will warrant intermediate scrutiny under the equal protection clause. 457 U.S. at 230. Unlike usual equal protection analysis, this level of scrutiny was appropriate despite the fact that neither a "fundamental right" nor a "suspect class"[26] was involved. 457 U.S. at 223.

> "...some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."
>
> *Plyler*, 457 U.S. at 221 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

This Court has never addressed whether less-than-absolute (partial) denials of educational opportunity would warrant intermediate review or warrant only low scrutiny (rational basis) review. Nonetheless, the Fifth Circuit founded its

[26]The invocation of intermediate scrutiny in *Plyler* was not triggered by the fact that aliens—perhaps a quasi-suspect class—were involved. 457 U.S. at 219 n.19.

denial of intermediate review on precisely this distinction. *Papasan*, 756 F.2d at 1075 (P.A. A-28).

This Court has, however, held that a mere differential in the funding of school districts will not warrant intermediate review when the differential: (1) is an accidental result of a facially-neutral, homogeneous, statewide school financing system (based upon local property taxes),[27] and (2) does not result in denying any child a minimally adequate education. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 24, 55 (1973).

Careful attention to the salient features in *Plyler* and *Rodriguez* yields the following comparison:

> (1) In *Plyler*, state officials *acted discriminatorily*—that is, with intent to single out a specific group of children for different treatment—and in the denial of equal educational opportunity caused *extreme prejudice* to the alien schoolchildren;
>
> (2) In *Rodriguez*, state officials *did not discriminate*—no distinction was drawn between groups of schoolchildren—and the accidental funding differential resulted in *no cognizable prejudice* to the resulting education.[28]

In view of the foregoing comparison,[29] the plight of the Chickasaw Cession schoolchildren, while not mirroring the

[27]While not expressly a factor in the *Plyler* holding, the injury in *Plyler* was not accidental, but was rather the result of discriminatory acts by state officials in drawing a legal distinction between the alien schoolchildren and other schoolchildren generally. 457 U.S. at 205. Similarly, the Chickasaw Cession schoolchildren—the trust beneficiaries—are singled out for special deprivation by state officials who violate their duties as trustee.

[28]The funding differential was found "not the product of purposeful discrimination against any group or class." 411 U.S. at 55. Also, after a lengthy trial, it was not disputed in *Rodriguez* that all children received an adequate education. 411 U.S. at 24-25, 36-37.

[29]While perhaps coincidental, this comparison points out that this Court's framework for determining when intermediate review is available produces results similar to what one would derive from application

facts in *Plyler* or *Rodriguez*, does fit well into the overall method of analysis used by this Court. The Chickasaw Cession schoolchildren, like those in *Plyler* and unlike those in *Rodriguez*, suffer this victimization as a result of affirmative acts of discrimination by state officials that divide Mississippi schoolchildren into two classes and treat one of those classes in a shameful manner. Further, through the denial of a minimally adequate education,[30] the Chickasaw Cession schoolchildren—while they do not suffer an absolute denial of educational opportunity as in *Plyler*—suffer *extreme prejudice* as the children in *Plyler* did.[31] The foregoing illustrates that intermediate scrutiny is the appropriate level for evaluating the deprivation suffered by the Chickasaw Cession schoolchildren. Use of this level of scrutiny is entirely consistent with this Court's prior opinions in *Plyler* and *Rodriguez*.[32]

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of a "cause and prejudice" test. *See Strickland v. Washington*, ___ U.S. , 80 L.Ed.2d 674 (1984) (cause-and-prejudice test in ineffective assistance of counsel determinations); *Engle v. Isaac*, 456 U.S. 107, 135 (1982) (cause-and-prejudice test employed in evaluating waiver in habeas corpus).

[30]Given the procedural posture of this case, this injury asserted in the Complaint at ¶¶ 2, 37-38, 51-55 (J.A. 2, 14-15, 20-22), must be accepted as true.

[31]The paltry sums received "in lieu of" school lands trust income by the Chickasaw Cession schools have no relationship whatsoever to differing land values or differing levels of local land management.

[32]Other evidence that a heightened scrutiny is appropriate for evaluating discrimination in the area of educational opportunity is contained in the policy embodied in congressional legislation designed to secure rights and protection to education.

> Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers.
>
> 20 U.S.C. 1221-1 (1974).

D. Intermediate Review Should Be Available For Educational Deprivations That Are Caused By Discriminations That Result In Prejudice—Whether Characterized As "Absolute" Or "Partial"

There would appear little to support the reasoning—employed by the Fifth Circuit—that an absolute denial of educational opportunity warrants intermediate review, but a partial (non-absolute) denial of educational opportunity so severe as to deprive children of a minimally adequate education warrants only rational basis review. Following this logic, intermediate review would be inappropriate if a state provided a separate-but-unequal system—as does Mississippi—in which the schools are "inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel." *Brown v. Board of Education of Topeka*, 347 U.S. 483, 487-88 n.1 (1954) (describing the conditions in Delaware's separate-but-unequal schools). The discriminatory treatment which the Chickasaw Cession schoolchildren receive at the hands of state officials is no more justified than would be the identical mistreatment based on race.

Moreover, there is little logical integrity to the distinction between "absolute denials" and "partial denials". A "partial" deprivation from one point of view is often an "absolute" deprivation from another. The deprivation in *Plyler* can be characterized as involving either a "partial" or an "absolute" deprivation. If *Plyler* is construed to involve educational opportunities generally, then the deprivation is only partial as the parents of the alien schoolchildren could pay tuition to obtain the desired education. If, however, *Plyler* is said to involve the availability of a *free* public education, then the deprivation is absolute.

As with *Plyler* schoolchildren, the plight of the Chickasaw Cession schoolchildren can fit under either "partial" or "absolute" labels. With regard to the availability of educational opportunity generally, the Chickasaw Cession schoolchildren suffer a partial deprivation. But, with respect to the receipt of school lands trust funds, the Chick-

asaw Cession schoolchildren suffer an absolute deprivation—they receive not one penny of money generated from school trust lands.[33]

The foregoing illustrates that "partial" and "absolute" characterizations of deprivation are artificial thresholds for choosing what level of scrutiny is appropriate. "Partial" and "absolute" are tools of analysis, not bins to put cases in. Nearly every discrimination can fit under either label depending on what point of view one adopts—and either viewpoint would appear totally proper. Determinations of what level of scrutiny is constitutionally demanded cannot rest upon such unpredictable and will-o-the-wisp labeling.

E. The Discrimination Against The Chickasaw Cession Schoolchildren Warrants Intermediate Level Review

The Chickasaw Cession schoolchildren are the victims of invidious discrimination. In eligibility for the benefits of school lands trust income, Chickasaw Cession schoolchildren are segregated from schoolchildren in the rest of the state. This segregation serves no legitimate purpose, let alone an important governmental objective. *See supra* §II(B).

The Fifth Circuit's reliance upon the "partial deprivation/absolute deprivation" dichotomy has been demonstrated to be a specious basis for evaluating the availability of intermediate review. Analysis has also revealed that the discrimination and prejudice suffered by the Chickasaw Cession schoolchildren is homologous with that imposed upon the schoolchildren in *Plyler*. Further, there is a high federal interest in securing equal and adequate educational opportunities throughout our nation. Given this situation, the Chickasaw Cession schoolchildren are entitled to have

[33]The pittance the Chickasaw Cession schools do receive is a legislative appropriation connected neither in source or amount to the school lands trust fund.

the discrimination against them evaluated under intermediate scrutiny.[34]

CONCLUSION

This case should be remanded for a full trial on the merits on all claims so that, as swiftly as possible, the Chickasaw Cession schoolchildren may be afforded relief from the continuing violations visited upon them.

Respectfully submitted,

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[34]Petitioners realize that this Court may be reticent to announce a constitutional principle concerning levels of review in a case with no developed proof regarding the challenged discrimination. Given the procedural immaturity of this case, the Chickasaw Cession schoolchildren deserve at least the opportunity to develop a full record so that this Court can more properly analyze the propriety of intermediate review for this discrimination.

No. 85-499

In the Supreme Court of the United States

OCTOBER TERM, 1985

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL.,
Petitioners.

VS.

WILLIAM A. ALLAIN, GOVERNOR, STATE OF MISSISSIPPI, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

I. Whether the United States Court of Appeals for the Fifth Circuit was correct in determining that this action was an action against the State of Mississippi and therefore the jurisdictional bar of the Eleventh Amendment to the Constitution of the United States prohibited the claims asserted by the Petitioners?

LISTING OF PARTIES

Respondents:

Petitioners have neglected to list the State of Mississippi as a party despite the fact that it has been named as such in the Complaint. (J.A. 5).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

Texts

No. 85-499

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BRIEF FOR THE RESPONDENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

U. S. Constitution, Amend. XI

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another state or by citizens or subjects of any foreign state."

U. S. Constitution, Article III, §§ 1 and 2

STATEMENT OF THE CASE

The petitioners filed their Complaint on June 12, 1981, naming therein as state defendants[1] "The State of Mississippi; William F. Winter, Governor, State of Mississippi;[2] Edwin Lloyd Pittman, Secretary of State and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi;[3] Charles E. Holladay, Superintendent of Education and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi;[4] William A. Allain, Attorney General and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi;[5] A. Michael Espy, Assistant Secretary of State, State of Mississippi".[6] Each of the individual state defendants and their "predecessors in office" are named in their official capacity only. (J.A. 2, paragraph 3).

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1. All state defendants are jointly referred to herein as "state defendants" and the state officials named will be referred to as "individual state defendants".

2. Now succeeded in office by William A. Allain.

3. Now succeeded in office by Richard Molpus. As noted in footnote 4 below, the Secretary of State is no longer a member of the State Board of Education.

4. The elective position of Superintendent of Education was abolished, effective July 1, 1984, pursuant to amended § 206 of the Constitution of the State of Mississippi, approved by referendum on November 1, 1983 and § 37-3-39(2)(a) of the Mississippi Code of 1972, as amended. The Constitutional amendment further removed the Superintendent of Education, the Attorney General and the Secretary of State as members of the State Board of Education. The superintendent is not a member of the Lieu Land Commission. *See*, § 29-3-17 of the Mississippi Code of 1972, as amended.

5. Now succeeded in office by Edwin Lloyd Pittman. As noted above, the Attorney General of the State of Mississippi is no longer a member of the State Board of Education.

6. No longer holds this position nor was he ever a member of the Board of Education or the Lieu Land Commission.

The petitioners are the county superintendent and boards of education in school districts located in all or part of 23 counties and school children and parents in those districts (J.A. 4) who allege that the state defendants and their predecessors in office violated the petitioners' due process and equal protection rights under the Fourteenth Amendment to the United States Constitution. The crux of the allegations is that when the Chickasaw Indian Tribe ceded its lands in Mississippi under the Treaty of Pontitock Creek[7] in 1832, the United States failed to reserve the sixteenth sections located therein from the sale of all Chickasaw lands by the United States at public auction in order that the Chickasaw nation could "realize the greatest possible sum" therefrom.[8] (J.A. 11, paragraphs 28 and 29). Subsequently, pursuant to Acts of Congress on July 4, 1836 and June 13, 1842,[9] authority was granted for the Governor of the State of Mississippi to select "lieu land" outside the counties and this was accomplished. (J.A. 61-62). These lands were subsequently leased for ninety-nine (99) years in 1848 and were subsequently sold[10] as ratified by the Act of Congress of May 12, 1852.[11] (J.A. 63). The funds were then invested in railroad companies to secure the construction of railroads throughout the state. (J.A. 90-92, paragraph 10). Due to the destruction of the railroads during the Civil War, the securities received for such investments

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7. For simplicity, other references to this treaty will use the modern spelling of "Pontotoc".

8. Article I, Treaty of Pontotoc.

9. 5 Stat. 116, Ch. CCCLV; 5 Stat. 490, Ch. XL.

10. The State Representatives and Senators of the Chickasaw Cession counties voted in favor of these acts. Miss. House Journal of 1848, pp. 388, 537, Miss. Senate Journal of 1848, p. 711.

11. 10 Stat. 6, Ch. XXXV.

were rendered worthless. (Petitioners' brief at page 9).[12] Despite this, the State has continued to pay interest to the Chickasaw Cession school districts on the corpus of the fund which was $1,036,515.00. Section 212 of the Constitution of 1890 of the State of Mississippi established the Chickasaw Cession Lieu Land Fund and sets the interest rate thereon at six percent (6%). (J.A. 65).

The petitioners' Complaint seeks ("through legislative appropriation or otherwise") the following specific relief from the state defendants:

> a. "conveyance to them of . . . real and/or personal properties (including money) of equivalent income producing value" [as the original Sixteenth Sections in Chickasaw Cession];
>
> b. "conveyance to them of . . . other real and/or personal properties (including money) of equivalent income producing value" [as the original Chickasaw Cession Lieu Lands];
>
> c. "That . . . the defendants . . . be enjoined and directed to take such actions as are necessary and appropriate to set aside and make available for the use and benefit of the plaintiffs . . . a fund or funds of such value and in such amount as may reasonably be necessary to:
>
> > 1. Provide annual income to the respective Chickasaw Cession School Districts hereafter at a level equivalent to the level of income which each could reasonably expect to enjoy if the District

12. The last Act in regard to the sale of the Chickasaw Cession lieu lands and investment of the funds derived therefrom was in 1859, prior to the adoption of the Fourteenth Amendment to the Constitution of the United States in 1868.

> still owned in trust its original Chickasaw Cession Sixteenth Section Lands or its Original Chickasaw Cession Lieu Lands, whichever are the more valuable, and said lands were given over to their highest and best income producing use, *and* in addition,
>
> 2. To compensate and make whole petitioners and respondent class[13] for all income their respective school districts could have received from 1832 to the present if they had been receiving the income from their respective Chickasaw Cession Sixteenth Section Lands, or, in the alternative, their respective Chickasaw Cession Lieu Lands, if such lands had been subjected to such prudent use and reasonable management . . . as would have been required of trustees holding properties in trust and as would have produced maximum levels of annual income, *and*
>
> 3. To compensate petitioners and the plaintiff class for the interest that would have been earned on the funds described in (b)[2] above had said funds been received annually and immediately thereafter invested at the best rate of interest then available, and further, had said funds remained so invested continuously until this time with interest compounded annually."
>
> d. "Acquire, set aside and make available for the use and benefit of the petitioners and the petitioner class . . . appropriate new lieu lands (which may include offshore oil, gas and other mineral rights and interests owned by . . . the State of Mississippi)";

13. Petitioner Class certification was held in abeyance until a decision on motions to dismiss.

e. "Take any and all other steps or actions as may be reasonably necessary or appropriate to:

> 1. Make available to petitioners and the petitioner class properties of value equivalent to the current fair market value of the properties [allegedly] unlawfully sold . . . or
>
> 2. Make available to petitioners and the petitioner class in perpetuity income at such level as may be equitable and just, or
>
> 3. Eliminate and compensate and for the future guarantee and protect petitioners and the petitioner class against . . . denials and deprivations of their rights to due process of law and to the equal protection of the laws";

f. "Develop, prepare and file with the Court . . . a plan for the orderly implementation of the declaratory and injunctive relief otherwise granted." (J.A. 23-24 and 26-29).

The Complaint makes no contention or allegation that any current statute, law or constitutional provision of the State of Mississippi is unconstitutional, nor do petitioners seek to have any so declared. All relief sought is based on acts that occurred prior to 1859. (J.A. 26-30). The petitioners make no assertion in the Complaint or their brief as to the provisions of the Constitution which were in effect at the time of the lease and sale of the lieu lands in question. There were no restrictions on the disposal of 16th section as lieu lands.[14]

14. The only provision regarding education in the Constitution at the time of the acts complained of was Article VII, Section 14 of the Constitution of 1832 which provided: "Religion, morality and knowledge, being necessary to good government, the preservation of liberty and the happiness of man, schools and the means of education shall forever be encouraged in this state."

The state defendants filed their motion to dismiss on October 2, 1981 and set forth various grounds therefor, including failure to state a claim, the Eleventh Amendment jurisdictional bar, applicable statutes of limitation, lack of standing to bring the action and laches. (J.A. 31-33). Each of these positions, together with other grounds, were briefed, argued and presented to the District Court.

The District Court, on January 20, 1984, dismissed the Complaint against all state defendants based on the Eleventh Amendment jurisdictional bar and the applicable statutes of limitation. (P.A. 36-39). The United States Court of Appeals for the Fifth Circuit affirmed the District Court decision on April 5, 1985 and denied re-hearing *en banc* on May 21, 1985. (P.A. 1-35).

STATEMENT OF THE FACTS

Although respondents do not challenge the Statement of the Facts as presented by petitioners, they do find that "certain statements" contained therein are not complete. A factor which should be included in the Statement of Facts is that every school district in the State of Mississippi receives the exact same appropriation based on teacher units under the Minimum Program of Education Grant. (§ 37-19-1, *et seq.* of the Mississippi Code of 1972, as amended).[15] No school district in other sections of the

15. This program is based on "teacher units" which is computed on average daily attendance figures. It funds teachers' salaries, superintendent and principal salaries, and separate services such as salaries for art and music teachers, librarians, and guidance counselors, as well as providing for nurses and lunch room personnel, together with funds for textbooks, audio visual equipment, building improvements and costs of transportation. *cf. San Antonio School District v. Rodriguez*, 411 U.S. 1, 44-45, 47, 36 L.Ed.2d 16, 50, 51, 93 S.Ct. 1278 (1973).

State of Mississippi receives any appropriation from the Mississippi Legislature that the Chickasaw Cession counties do not receive.

All funds derived from 16th section leases are derived from the actions of the respective local school districts and not from the state, pursuant to § 29-3-1, *et seq.* of the Miss. Code of 1972, as amended. (J.A. 71-79). The state does not lease the lands nor does it receive the funds paid therefor and re-distribute them in some manner. (P.A. 28-29). Of course the funds derived by the non-Chickasaw Cession counties vary widely depending upon the location of the 16th section leases, mineral income and the skills of the local administrators. (P.A. 29). For instance, Neshoba County receives $3.03 per student while the neighboring county of Kemper received $118.65 and Lauderdale County, immediately south of Kemper, receives $5.80. On a per acreage basis, Neshoba receives $1.13; Kemper, $16.25; and Lauderdale, $6.20. Special Report on Chickasaw Cession School Districts. (J.A. 45 and 46). Therefore, respondents would adopt the facts as found by the 5th Circuit as set out in Petition for Certiorari Appendix at Pages A-3 through A-35.

SUMMARY OF ARGUMENT

The lower court was eminently correct in affirming the dismissal of the Complaint by the District Court in this matter on the basis of the Eleventh Amendment jurisdictional bar as provided by the Constitution of the United States.

Recent case authority holds that, at most, petitioners are only entitled to the relief requested in the Complaint. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723, 73 L.Ed.2d 1090, 1097, fn. 7, 102 S.Ct. 331 (1982).

The actions complained of which took place over one hundred thirty (130) years ago were legal and proper, including the investment of the funds derived from the sale of lands. *Cooper v. Roberts*, 18 How. 173, 15 L.Ed. 338 (1856); *Alabama v. Schmidt*, 232 U.S. 168, 173-174, 58 L.Ed. 555, 558, 34 S.Ct. 301 (1913), and *State of Louisiana v. William T. Joyce Co., et al.*, 261 F. 128, 131 (5th Cir. 1919).

The Eleventh Amendment to the Constitution of the United States provides a constitutional jurisdictional bar to the petitioners bringing this action for any type of relief, whether prospective or retroactive, even though the petitioners named public officials in their official capacity, because this is, in effect, a suit against the State of Mississippi which it has not consented to. *Edelman v. Jordan*, 415 U.S. 651, 662, 663, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974); *Florida Department of Health v. Florida Nursing Home Association*, 450 U.S. 147, 67 L.Ed.2d 132, 101 S.Ct. 1032 (1981); *Alabama v. Pugh*, 438 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 89 L.Ed. 389 (1945); *Louisiana v. Jumel*, 107 U.S. 711, 720-723, 727-728 (1892); *Corey v. White*, 457 U.S. 85, 91, 71 L.Ed.2d 694, 102 S.Ct. 2325 (1982); *Pennhurst v. Halderman*, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984); *Atascadero State Hospital v. Scanlon*, 437 U.S. ....., 87 L.Ed.2d 171, 105 S.Ct. ..... (1985); *Green v. Mansour*, 474 U.S. ....., 88 L.Ed.2d 371, 106 S.Ct. ..... (1985); and *Gay Student Services v. Texas A & M University*, 737 F.2d 1317 (5th Cir. 1984). The State of Mississippi and its agencies cannot waive their immunity without statutory authorization. *Horne v. State Building Commission*, 233 Miss. 810, 103 So.2d 373 (1958). The State of Mississippi has specifically preserved its immunity from suit in Federal Court, Section 11-46-5(4) of the Mississippi Code of 1972, as amended (1985).

There has been no absolute denial of a public education to any petitioner and mere differences between school districts in the amount of funds received is not a constitutional violation since education is not one of the rights afforded explicit protection under the Constitution nor is it implicitly protected thereunder. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973). Further, rather than diminish education opportunity, the legislature, with the creation of the Chickasaw School Fund, has increased funds available for the respective districts. 1985 Miss. Laws 27, Ch. XXIII. (J.A. 97-98). Further, Section 212 of the Mississippi Constitution of 1890 provides an additional source of funds appropriated by the state which non-Chickasaw Cession districts do not receive.

Alternatively, although not specifically addressed by the lower court, the petitioners have not alleged a case or controversy pursuant to Article III of the United States Constitution. *See, Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982).

ARGUMENT

I.

Introduction

On October 20, 1832, the Treaty of Pontotoc was entered into between the Chickasaw Nation and the United States of America which ceded "all of the land they [the Chickasaw Nation] own on the east side of the Mississippi . . ."[16] under the terms that *all of the land,* except

16. Article I, Treaty of Pontotoc.

that specifically reserved to the members of the tribe named, be sold at public auction in order that the Chickasaw Nation "realize the greatest possible sum for their lands which can be obtained."[17] Nowhere in the treaty is any provision made for the reservation of any of the ceded lands for any purpose except for members of the Nation who did not desire to move.[18]

This cessation together with the cessation by the State of Georgia of the Mississippi Territory[19] completed the transfer of the lands which have been referred to in the Complaint as the "Chickasaw Cession Lands". Tersely put, the Chickasaw Nation was astute enough to require *all* of its lands to be sold with the Nation receiving the proceeds.[20] Despite any contentions to the contrary by petitioners, a treaty is the Supreme Law of the Land.[21] Despite any protestations to the contrary, any ordinances and enactments in conflict with this treaty must fall. Therefore, the march of chronological events proceeds to the establishment and procurement of "Chickasaw Lieu Lands".

Mississippi had been admitted to the Union in 1817. On July 4, 1836, less than four years after the execution of the Treaty of Pontotoc, the Congress of the United States provided that the State of Mississippi could select acres in "lieu" of the 16th Sections not permitted to be

17. Article VIII, Treaty of Pontotoc.

18. Article IV, Treaty of Pontotoc.

19. April 14, 1802.

20. This was done despite the fact that Colonel John Coffee who negotiated on behalf of the United States had negotiated other treaties in Mississippi with the Choctaw Indian Tribe that excepted the 16th section from sale. Treaty of Dancing Rabbit Creek, 1830.

21. Article VI, Section 2, U. S. Constitution.

reserved by the Chickasaw Nation. This was accomplished. However, only the area of the Mississippi Delta remained for most selections and at that time it was swampy and subject to flooding by the Mississippi River as well as other rivers crossing same as well as being disease prone. *McLemore,* a History of Mississippi, Vol. II at 183 (1973).

In 1848 the State of Mississippi authorized the sale or lease of these lieu lands by legislative enactment[22] which included affirmative votes by the Senators and Representatives of certain of the counties then in existence and located in the Chickasaw Cession.[23] This land was subsequently conveyed according to said statutes as the State was authorized to do once it had received the lands, since there was no prohibition contained in the grant of the lieu lands. The monies received therefrom were placed in investments for the respective school districts. The contention of petitioners that the state was not authorized to dispose of school lands is totally without foundation. The admission of the State of Mississippi to the Union in 1817 vested the title to all Sixteenth Section and lieu lands in the state from the United States after the surveys were complete. The Chickasaw Lieu Lands Act, 5 Stat. 116, Ch. CCCLV (1836), provides in pertinent part ". . . and said lands thus selected, shall be holden by the same tenure, and upon the same terms and conditions, in all respects as the said state now had as to lands heretofore reserved for the use of

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22. 1848 Miss. Laws 62, Ch. III. (J.A. 82-85). The price of $6.00 per acre seems reasonable for the period in question since the land was swampy and subject to flooding with few roads or settlements.

23. House Journal, 1848, p. 800, Senate Journal, 1848, p. 711.

schools in said state." (J.A. 61). Of course, the 1817 Land Sales Act for Mississippi, 3 Stat. 375, Ch. LXII, in regard to Sixteenth Section lands only provides that Section No. 16 in each township "shall be reserved for the support of the schools therein." (J.A. 60). "The trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the State is plenary and exclusive". *Cooper v. Roberts,* 18 How. 173, 15 L.Ed. 338 (1856). "[T]he gift to the state is absolute and there is a sacred obligation imposed on public faith, but that obligation is honorary . . . *and even in honor would not be broken by a sale and substitution of a fund . . . a course that we do not believe to be uncommon among the States.*" (Emphasis supplied). *Alabama v. Schmidt,* 232 U.S. 168, 173-174, 58 L.Ed. 555, 558, 34 S.Ct. 301 (1913). The state had and has authority to subject this land in its hands to the ordinary incidents of other titles in the state. *Alabama v. Schmidt, supra.* Therefore, this contention, along with the first concerning the non-reservation of the Sixteenth Section Land in the original treaty are laid to rest.

The State of Mississippi did not even have to seek to ratify the sale of the lieu lands by Congress. (J.A. 63). Suffice it to say that the law is complete on the subject that once the "gift" of the land is made to the state and the survey is complete, the United States no longer has any control over the leasing or disposition thereof. *United States v. Morrison,* 240 U.S. 192, 60 L.Ed. 599, ... S.Ct. ..... (1916). Therefore, if Congress cannot control what it doesn't have, any attempt by Congress to place conditions on the disposition of the land after the gift is complete is totally without any force and effect. There were no words in the original "gift" which could be considered

as conditional and, therefore, it was not conditioned or restrained. There was no State Constitutional provision restraining the alienation of the "Lieu Land" when the lands were conveyed by the state.[24] Petitioners do not challenge the constitutionality of this section or any other current section or law. Therefore, the validity of such disposition is not dependent upon a compliance with a qualified permission to sell enacted by Congress after the lands had ceased to belong to the United States. *State of Louisiana v. William T. Joyce Co., et al.*, 261 F. 128, 131 (5th Cir. 1919), citing *Cooper v. Roberts, supra, Alabama v. Schmidt, supra.*

In *Pennhurst State School v. Halderman,* 451 U.S. 1, 67 L.Ed.2d 694, 101 S.Ct. 1531 (1981), this Court held that Congress must, unambiguously, fix the terms on how a State shall disburse federal monies before a State can be required to expend or distribute federal monies in a specific manner.

The Court observed:

> ". . . [O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. . . . [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the State agrees to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under

24. See Footnote 14, *supra.* It is of particular moment that Article 8, Section 211 of the Mississippi Constitution of 1890, even today in regard to lieu lands provides in pertinent part:

> . . . provided, however, that land granted in lieu of sixteenth section land in this state and situated outside of the county holding or owning same, may be sold and the proceeds from such sale may be invested in a manner to be prescribed by the Legislature; . . .

> the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract. [Citations omitted]. There can be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [Citations omitted]. By insisting that Congress speaks with a clear voice, we enable the states to exercise their choice knowingly. . . ." 67 L.Ed.2d at 707.

Of course the same logic and reasoning should apply as to 16th section or lieu lands since the State of Mississippi had no basis to believe that the sale of the lieu lands and the establishment of a fund with the proceeds thereof for the school districts involved would attempt to be judged by standards other than those in effect at the time. Retroactive changes, as petitioners seek, in the terms of the grant would deny the States fixed, predictable standards in many fields for determining if their actions are proper. *cf. Bennett v. New Jersey,* 470 U.S. ....., 84 L.Ed.2d 572, 580, 106 S.Ct. ..... (1985).

The State has the power to sell school lands without the consent of Congress once the lands are granted to the State unless restrictions are placed thereon by Congress at the time of the grant to the state and before the survey is completed.[25] Such was not done in the Chickasaw Lieu Land grants nor any other grant to the State of Mississippi.

25. *Andrus v. Utah,* 446 U.S. 500, 64 L.Ed.2d 458, 100 S.Ct. 1803 (1980); *Lassen v. Arizona* 358 U.S. 458, 17 L.Ed.2d 515, 87 S.Ct. 584 (1967); *U.S. v. Morrison,* 240 U.S. 192, 60 L.Ed. 599, 36 S.Ct. 326 (1916).

It is undisputed that upon the sale of the lands in question, the funds derived therefrom were placed in trust as authorized by 1848 Miss. Laws 62, Ch. III. (J.A. 83-84, Sec. 5). The state was and is the trustee as no officer of the state was or has been named to act as trustee or administrator of the trust. Subsequently, the Mississippi Legislature, by the Acts of 1856 (J.A. 87 at 91-92), authorized an amount derived from the sale of these lands to be invested in certain railroads with first mortgage bonds taken as security therefor to be equal in value to the loan to each railroad, earning eight percent (8%) annually, secured by *all* property and effects of the company. In addition, stock certificates of each railroad equal to four (4) times the amount of the loan, all payable to the State of Mississippi, were taken as security. (J.A. 91-92). These loans were repaid in part prior to the War between the States and during said travail, additional payments were made in specie or state treasury notes. However, these later payments were declared not to be valid and the State subsequently sought to obtain payment in hard currency and prevail. *MCRR v. The State of Miss.*, 46 Miss. 157 (1871); *N.O.S.&L. Chicago R.R. v. The State*, 52 Miss. 877 (1876).

Of course, the trustee cannot be held responsible for the loss of the investment when the loss was occasioned by acts beyond his control (such as a war and the destruction of the railroads' "property and effects") and which did not result from a breach of trust. III Scott on Trusts § 204 (3rd Edition (1967)). III Scott, *supra* at § 227 provides:

> "The conduct of the trustee in making an investment is to be judged at the time when he made it and not at some later time. It would obviously be unfair to the trustee to hold him liable for a loss which he has no reason to foresee at the time when he made the investment, although after the loss occurred it is possible to see that the causes of the loss were operating at the time when the investment was made. The facts should be looked at as they existed at the time of their occurrence, not aided by those which subsequently took place and a wisdom developed after an event, and to have it and its consequences as a source, is not a fair standard to apply."

Petitioners have, therefore, attempted to raise a smoke screen to hide the only issue in this cause. To summarize, the State of Mississippi received the lieu lands without restrictions, disposed of said land in conformity with the law (then and now), invested the funds derived therefrom in prudent secured investments, but due to a great war, the funds loaned and the security for these investments were destroyed, yet the State has continued to pay the interest on the funds to the Chickasaw Cession school districts.

Therefore, what we have is a lawsuit that seeks to have the Court order (1) an increase in the amount upon which interest is paid, and/or (2) increase the interest paid on same. Each requirement would destroy the very purposes for which the Eleventh Amendment was enacted.

II.

There Are No True Defendants Except the State of Mississippi

It is well settled that "the State of Mississippi" and its agencies cannot be subjected to the jurisdiction of the federal courts. However, there are state officials who are defendants who are named in their official capacities as

members of the Lieu Land Commission of the State of Mississippi or the State Board of Education or both.[26]

Initially, it should be determined why they were named defendants since they are not the successors to the individuals who allegedly took the acts complained of. Each act complained of was mandated by state statute prior to the adoption of the 14th Amendment and the payment of funds is authorized by the current Constitution of the state. The person who was directed to loan the money at the time to the railroads and take the security therefor was the state auditor of public accounts. (J.A. 91). In fact, the Lieu Lands Commission was not even created until 1942[27] and its duties under § 29-3-15, *et seq.* of the Miss Code of 1972 (J.A. 72), as amended, are limited to "sell all lands granted in lieu of the 16th section lands which are located outside the county owning said land situated in the State of Mississippi." Conversely, the State Board of Education has no duties or obligations and never has had regarding 16th section or lieu lands.[28] Further, the Superintendent of Education has no duties or obligations regarding 16th section or lieu lands and never has.[29] In regard to funds

26. Except for the Defendant Harvey, about whom it is unclear why she is named as a defendant since she is not a member of either the Lieu Land Commission, or the Board of Education, nor has her predecessor ever been

27. Chapter 162, General Laws of 1942.

28. Section 203 of the Mississippi Constitution now provides that as of July 1, 1984, the State Board is composed of nine lay members appointed from various sections of the state. Pursuant to § 37-1-1, *et seq.* of the Miss. Code of 1972, as annotated and amended, no duties are mentioned as to either 16th section or lieu lands.

29. The new State Superintendent of Education, effective July 1, 1984, is appointed by the Board of Education and, pursuant to § 37-3-11, has no duties or obligations regarding 16th section or lieu lands and is not a member of the Lieu Land Commission.

derived from the sale of sixteenth section lands or lieu lands, the state can only act through the Legislature. *Daniel v. Sones*, 147 So.2d 626, 629 (Miss. 1962); *City of Corinth v. Robertson*, 87 So. 464 (Miss. 1921). The only thing the Governor of the State of Mississippi has had to do with this matter is that Congress allowed him to select the lands granted in lieu of those the federal government failed to reserve under the treaty. Therefore, petitioners have initially sued the wrong public officials or at the least, ones who can in no way grant the relief requested should the Court so order. It should also be pointed out that they are not trustees under Section 212 of the Mississippi Constitution and the trust established thereby is administered by the legislature of the State of Mississippi which is the only body that can appropriate and authorize the expenditure of the funds therefor. *Daniel* and *City of Corinth, supra.*

III.

A.

The Eleventh Amendment to the Constitution Is a Jurisdictional Bar to Petitioners' Complaint

The issue before the Court is whether the lower courts were correct in determining that the claims of the petitioners were subject to the jurisdictional bar of the Eleventh Amendment to the Constitution of the United States. Respondents assert that the lower courts were eminently correct.

The Eleventh Amendment to the Constitution of the United States reads as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity

> commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

Although this amendment on its face does not bar suits against a state by its own citizens, this Court has consistently held that such suits are barred unless the particular state has consented to suit. *See, Hans v. Louisiana,* 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504 (1890); *Edelman v. Jordan,* 415 U.S. 651, 662, 663, 39 L.Ed.2d 662, 672, 94 S.Ct. 1347 (1974); *Florida v. Treasure Salvors, Inc.,* 458 U.S. 670, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982). It is clear that in the absence of consent, a suit in which a state or one of its agencies or department is the defendant is jurisdictionally barred by the Eleventh Amendment. In the State of Mississippi, statutory waiver of sovereign immunity is necessary. *Horne v. State Bldg. Comm.,* 233 Miss. 810, 103 So.2d 373 (1958). As this Court has also found in *Florida Department of Health v. Florida Nursing Home Association,* 450 U.S. 147, 67 L.Ed.2d 132, 101 S.Ct. 1032 (1981) and *Alabama v. Pugh,* 438 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978), when the suit is against the state and its agencies this jurisdictional bar applies regardless of the relief sought. *See also, Missouri v. Fisk,* 290 U.S. 18, 27, 78 L.Ed. 145, 54 S.Ct. 18 (1933).

In the instant matter, as stated *supra,* the "State Defendants" named in the Complaint are now as follows: "The State of Mississippi; William A. Allain, Governor, State of Mississippi; Richard Molpus, Secretary of State and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi; Richard A. Boyd, Superintendent of Education and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi; Edwin Lloyd Pittman, Attorney General and member of the Board of Education and member of the Lieu Land Commission, State of Mississippi; Constance Slaughter Harvey, Assistant Secretary of State, State of Mississippi." Each of the individually named defendants are named in their official capacity only. (J.A. 5-6).

There is not room for doubt that "the State of Mississippi", "the Board of Education" and "the Lieu Land Commission" cannot be sued in the federal courts pursuant to the Eleventh Amendment jurisdictional bar. *Alabama v. Pugh, supra.* The jurisdictional bar applies likewise to the named defendants as the allegations in this cause are couched. The Eleventh Amendment bars a suit against state officials when "the state is the real substantial party in interest". *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 89 L.Ed. 389 (1945); *In re Ayers,* 123 U.S. 443, 487-489 (1887); *Louisiana v. Jumel,* 107 U.S. 711, 720-723, 727-728 (1892).

> Thus "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon,* 373 U.S. 57, 58, 10 L.Ed.2d 191, 83 S.Ct. 1052 (1963) (per curiam).[11] And as when the State itself is named as the defendant, a suit against state officials that is, in fact, a suit against a state is barred *regardless of whether it seeks damages or injuncture relief. See, Corey v. White,* 457 U.S. 85, 91, 72 L.Ed.2d 694, 102 S.Ct. 2325 (1982) (Emphasis supplied).

Pennhurst v. Halderman, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984).

In *Pennhurst,* the Court went further in footnote 11, citing *Dugan v. Rank,* 372 U.S. 609, 10 L.Ed.2d 15, 83 S.Ct. 999 (1963), to say:

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain or interfere with the public administration,' or if the effect of the judgment would be, 'to restrain the Government from acting or to compel it to act.' "

It is beyond dispute that the relief sought by Petitioners, although now alleged to be only a suit for a mandatory injunction and not for retroactive relief (petitioners' brief at 37), would "expend itself on the public treasury or domain" of the State of Mississippi and "interefere with the public administration" of the state and "restrain the [State of Mississippi] from acting" or, in the alternative, "compel it to act", and cause property to be disposed of belonging to the State of Mississippi. (J.A. 26-30). Even petitioners' brief at 37 states that they seek an injunction to have the respondents, "comply in the future with the trust obligations assumed by virtue of the school lands trust by *providing Chickasaw Cession schools with trust income* commensurate with the obligations imposed by the trust." (Emphasis supplied). This is the exact thing *Edelman* and *Pennhurst, supra,* preclude.

Petitioners misconstrue the "obligations" imposed by the "trust". The only conditions imposed by the grant of the lieu lands (or 16th sections) to the State of Mississippi is ". . . for the support of the schools therein, . . ." The grants do not state any other restrictions or that these lands would be used for the total funding or minimally adequate funding of the schools in the township, unlike the grants to Arizona which contained further restrictions. *See, Lassen, supra,* and *Alamo Land and Cattle Co. v. Arizona,* 424 U.S. 295, 47 L.Ed.2d 1, 96 S.Ct. 910 (1976). The grant to Arizona was made under restrictions which became steadily more rigid and specific, but even then the State of Arizona can divert the lands to alternate public uses and compensate the trust for the market value of the interest taken. *Lassen, supra,* at 467-468.

As to the Boards and Commissions on which the individually named defendants serve, although not specifically named as defendants, they do not control the 16th section land leases or lieu lands leases. Nevertheless, this Court in *Alabama v. Pugh,* 438 U.S. 781, 782, 57 L.Ed.2d 1114, 1116, 98 S.Ct. 3057 (1978), put it very plainly:

> Among the claims raised here by petitioners is that the issuance of a mandatory injunction against the State of Alabama and the Alabama Board of Corrections is unconstitutional because the Eleventh Amendment prohibits Federal Courts from entertaining suits by private parties against states and their agencies . . . . There can be no doubt, . . . that suit against the state and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit.

Of course, the Lieu Land Commission and the Board of Education are agencies of the State of Mississippi in the same manner that the Department of Corrections is an agency of the State of Alabama. The Complaint filed in the instant cause does not even allege that the immunity of the State of Mississippi, the Lieu Land Commission and/or the Board of Education has been waived or that any consent has been given to this suit. Further, the State of Mississippi has never consented to waive either its sovereign or Eleventh Amendment immunity. See § 11-46-1 of the Mississippi Code of 1972, as amended (1985), which re-establishes sovereign immunity through July 1, 1986

and waives the immunity only for claims accruing after that date. Specifically, § 11-46-5(4) of this Act provides that "nothing in this act shall be construed to waive the immunity of the state from suit in federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States". This specific language was cited with approval in *Pennhurst, supra,* at footnote 12.

Further, the Mississippi Supreme Court has never abrogated sovereign immunity and stated in *Pruett v. City of Rosedale,* 421 So.2d 1046 (Miss. 1983).

> We do not abolish by this opinion the historical and well-recognized principle of immunity granted to all legislative, judicial and executive bodies and those public officers who are visited with discretionary authority, which principle of immurity rests upon an entirely different basis and is left intact by this decision.

B.

The Eleventh Amendment to the Constitution Is a Jurisdictional Bar to the Petitioners' Claims Against State Officials in Their Official Capacity

As to any contention by the appellants that they have asserted a claim for prospective relief since they sued the state officials in their official capacities and, therefore, the Eleventh Amendment jurisdictional bar does not apply, *Pennhurst, supra,* also lays this issue to rest.

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty

> than when a federal court instructs state officials on how to conform their conduct to state law.

Pennhurst, supra, at 79 L.Ed.2d 87.

Any claim by the petitioners that they are seeking prospective relief only simply will not survive close scrutiny of the Complaint. What they are seeking are "dollars or dirt" and the only thing "prospective" about the relief sought is that it would have to be paid in the future from the public treasury or domain of the State of Mississippi. The *Pennhurst* decision recognizes this in footnote 25, found on page 87:

> To say that injunctive relief against state officials acting in their official capacity does not run against the state is to resort to the fictions that characterize the dissent's theories. Unlike the English sovereign, perhaps, an American State can act only through its officials. It is true that the court in *Edelman* recognized that retroactive relief often, or at least sometimes, has a greater impact on the state treasury than does injunctive relief, *see* 415 U.S. 666, N. 11, but there was no suggestion damages alone were thought to run against the state while injunctive relief did not.

Pennhurst, supra, at 79 L.Ed.2d 87.

Of course, *Edelman v. Jordan,* 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974) provides:

> It is well established that even though a state is not named as a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945), the Court said:

> [W]hen the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are named defendants.

Id., at 464, 89 L.Ed. 389.

The *Edelman* Court did not stop here, however, but went even further to find that:

> Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment *Great Northern Life Insurance Co. v. Read, supra; Kennecott Copper Corp. v. State Tax Commission,* 327 U.S. 573, 90 L.Ed. 862, 66 S.Ct. 745 (1946).

What could be more on point? In the instant matter, the petitioners seek "by legislative appropriation or otherwise" (J.A. 23, paragraph 62), the establishment of a fund for the use and benefit of the petitioners having such amount of money or value as reasonably necessary:

> a. to provide annual income to the respective Chickasaw Cession School Districts hereafter at a level equivalent to the level of income which each could reasonably expect to enjoy, if said District still owned in trust its original Chickasaw Cession Sixteenth Section Lands, or its original Chickasaw Cession Lieu Lands, whichever are more valuable, and said lands were given over to their highest and best income producing use, and, in addition,
>
> b. to compensate and make whole Plaintiffs and the Plaintiff Class for all income their respective school

> districts would have received from 1832 until the present if they had been receiving the income from their respective Chickasaw Cession Sixteenth Section Lands, or in the alternative, their respective Chickasaw Cession Lieu Lands, if such lands had been subjected to such prudent use and reasonable management (which would have included placing said lands in their highest and best income producing use) as would have been required of trustees holding properties in trust and as would have produced maximum levels of annual income, and
>
> c. to compensate Plaintiffs and the Plaintiff class for the interest that would have been earned on the funds computed as described in (b) above had said funds been received annually and immediately thereafter invested at the best rate of interest then available, and further, had said fund remained so invested continuously until this time, with interest compounded annually;
>
> (2) acquire, set aside and make available for the use and benefit of Plaintiffs and the Plaintiff Class subject to the terms and provisions of the aforesaid perpetual and irrevocable trust appropriate new lieu lands (which may include offshore oil, gas and other mineral rights and interests owned by the United States and/or by the State of Mississippi);
>
> (3) take any and all other steps or actions as may be reasonably necessary or appropriate to
>
> (a) make available to Plaintiffs and the Plaintiff Class properties of value equivalent to the current fair market value of the properties unlawfully sold as aforesaid, or

(b) make available to Plaintiffs and the Plaintiff class in perpetuity income at such level as may be equitable and just, or

(c) eliminate and compensate and for the future guarantee and protect Plaintiffs and the Plaintiff class against the above described denials and deprivation of their rights to due process of law and to the equal protection of the laws;

(4) develop, prepare and file with the Court, and subject to confirmation and approval by the Court, a plan for the orderly implementation of the declaratory and injunctive relief otherwise granted; . . .

If this is not a prayer for an impingement on the State treasury, then what would be? As an aside, it should be pointed out as shown in the Complaint (J.A. 11, paragraph 28) that the petitioners admit that the sixteenth section lands were never reserved by the United States in the Treaty of Pontotoc Creek and all lands conveyed to the United States were, in accordance with the treaty, sold by it. Therefore, there were never any sixteenth sections in the treaty area that were conveyed to the State of Mississippi. But, back again to the point; the petitioners seek retroactive damages, and it can be classified as nothing else, from the State of Mississippi. The only ongoing act complained of is that the legislature of this state pays to the respective school districts six percent (6%) interest on the trust and not more. Certainly, the named individual defendants cannot provide the relief requested and as the petitioners admit, it would have to be by legislative act. Therefore, although the Complaint is drawn in artful terms as to the individual state defendants, it still cannot, upon close examination, evade or circumvent the Eleventh Amendment jurisdictional bar.

See, Gay Student Services v. Texas A & M University, 737 F.2d 1317 (5th Cir. 1984).

A close examination of *Edelman, Pennhurst, Atascadero* and *Green, supra,* reveals that in each case individual defendants were named. In *Edelman* it was obvious that the funds would not be paid from petitioner Edelman's pocket. *Edelman,* at 664. Certainly the same would be true here particularly since none of the individual state defendants has anything to do with the Chickasaw funds nor acts in any way as trustee thereof. This has all been reserved to the Mississippi Legislature. The Legislature is the trustee and not any individual state official. Here the petitioners are not asking for "prospective relief" which *may* have an ancillary effect on the treasury of the state. They are asking for an injunction that *will* have a direct effect on the state treasury and it certainly will not vindicate the supremacy of federal law. Here as in *Edelman,* any such injunction will "require payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination but as a form of compensation" to those who attend and/or manage the public schools in the Chickasaw Cession. It will be measured in terms of a monetary loss to the State of Mississippi resulting from an alleged past breach of an alleged legal duty on the part of the named individual state officials which they, nor their predecessor, have not had any duty in respect thereto. Here they are named only because of the positions they occupy; not because they or their predecessors acted or refused to act. They cannot provide the relief requested even if enjoined to do so.

Under the facts in the instant matter, *Milliken v. Bradley,* 433 U.S. 267, 53 L.Ed.2d 745, 97 S.Ct. 2749 (1977) so heavily relied upon by petitioners is easily distinguished. As the Court said in *Milliken,* in the opening paragraph,

certiorari was granted to consider the remedial powers of the federal district courts in school desegregation cases. This was the sole issue in *Milliken* and it must be viewed and limited as such since it focused only on an appropriate remedy to correct official de jure acts of *racial* discrimination which the petitioners did not challenge. The case was decided on "unique circumstances" and quite properly decided the issue only on specific racial discrimination grounds that resulted from a segregated school system. Respondents submit that the findings of *Milliken* are inapposite to the case *sub judice*.

In summary, can the acts of the United States Congress and the legislature of the State of Mississippi approximately one hundred and thirty (130) years ago (which were taken prior to the adoption of the Fourteenth Amendment in 1868), which were valid in all respects then (and are today) be imputed to elected and appointed public offices in Mississippi today who are charged with no duties concerning the administration of any funds in regard to the Chickasaw Lieu Land Fund under Article VIII, § 212 of the Mississippi Constitution of 1890? Respondents submit the answer to be a resounding "no". Certainly in each of the above cited cases, at least the individuals named in their official capacity were charged by law and actually performed a duty they were sued over and even then relief in the form of compensation was not permitted. In the matter *sub judice* such should also not be permitted.

IV.

There Is No Case or Controversy Under Article III of the United States Constitution

The issue of whether there is a case or controversy existing to satisfy the requirements of Article III of the

United States Constitution in order to maintain this action would also be a sufficient ground upon which dismissal of the complaint would lie. Of course, a plaintiff must allege *personal* injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. ....., 82 L.Ed.2d 556, 105 S.Ct. 51 (1985) and *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982). There is no logical nexus between the acts complained of by the petitioners and the respondents. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 48 L.Ed.2d 450, 96 S.Ct. 1917 (1976). In the instant matter, there is no injury even alleged by the Superintendents and/or School Board petitioners and the parents and the school children's alleged injury is too abstract (failure to receive a minimally adequate education or a reasonable opportunity therefor); the line of causation between the alleged conduct and the alleged injury and the individual official state defendants is too attenuated and the prospect of obtaining relief from the named state defendants in their official capacities as a result of a favorable ruling is too speculative. *Allen* and *Valley Forge, supra.*

The sole injury alleged to have been sustained by the petitioners by virtue of acts in the early to middle 1800's is that they are denied the right and interest in a minimally adequate level of education or a reasonable opportunity therefor.[30] The injury now is that they are

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30. The public perception and comments by at least one named plaintiff and a representative of another dispel this allegation. The Bramlet Elementary School in Oxford, Mississippi, which is a part of the Oxford Municipal Separate School District (Listing of Parties at vi and vii) and the Horn Lake Elementary School which is a part of the DeSoto County District (Listing

(Continued on following page)

not receiving as much money as they desire. Of course, this is saying that if enough money is spent, a minimally adequate education will be received. This theory has been disproved in numerous instances in all types of situations whether dealing with schools, foreign aid, war, etc. because the expenditure of funds simply does not guarantee success. The amount of funds spent has never guaranteed the success of any endeavor much less that of a minimally adequate education. *San Antonio School District, supra,* 411 U.S. at 23-24 and 41-42, 36 L.Ed.2d 16 at 37 and 48, 49, 93 S.Ct. 1278 (1973).

In a most recent case, this Court found in *Valley Forge Christian College v. Americans United for Separation of Church and State, supra,* 454 U.S. at 471, 70 L.Ed. 2d at 708 as follows:

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies". The constitutional power of the federal courts cannot be defined and indeed has no substance without reference to the necessity "to adju-

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Footnote continued—

of Parties at iv) have each been nominated to the United States Department of Education for participation in its Elementary School Recognition Program. They are two of seven schools nominated from the entire State of Mississippi which has 154 school districts. In response to the nomination of the Horn Lake School, DeSoto County School Superintendent, Albert Broadway (a named plaintiff), responded:

> "I just think they have an outstanding program. I think the organization is tops and the achievement level is excellent."

Dr. Carole Dye of the Bramlet School responded that her school offered French classes and stays abreast of research into teaching. She further stated that 95 per cent of the pupils score their grade level or higher on achievement tests. "We give it all we got. We intend for the children to do well", Dr. Dye said. Source: *Memphis Commercial-Appeal,* February 11, 1986, p. B2.

> dicate the legal rights of litigants in actual controversies" *Liverpool Steamship Co. v. Commissioners of Immigration,* 113 U.S. 33, 39, 28 L.Ed. 899, 5 S.Ct. 352 (1885). The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with the courts of law in terms that have a familiar ring to those trained in the legal process.

Respondents submit that this is what the petitioners have attempted to do in the instant matter. The Court in *Valley Forge, supra,* further stated at 454 U.S. 472, 70 L.Ed.2d 709:

> . . . at an irreducable minimum, Art. III requires that a party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant'. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision'. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41 (1976) [Footnote omitted].

The Court also found in *Valley Forge, supra,* 454 U.S. at 474-475, 70 L.Ed.2d at 711, citing *Worth v. Seldin.*

> In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Article III, the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to generalized grievances pervasively

shared and most appropriately addressed in the representative branches. [Citation omitted].

Therefore, the only injury alleged by petitioners is so abstract that no claim or controversy can possibly exist under Article III which would give these petitioners standing to bring this action even assuming, which state defendants do not admit, proper jurisdiction. As the Court stated in *San Antonio, supra*:

> "The argument here is not that the children in districts having relatively low assessable property value are receiving no public education; rather it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it.[56] A sufficient answer to appellees' argument is that where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor, indeed, in the view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense.
>
> *San Antonio, supra,* 411 U.S. at 23-24. [Footnote omitted].

If the words "no Sixteenth Section and Lieu Lands" are substituted for "relatively low assessable property values" and "Sixteenth Section and Lieu Lands" for "more assessable wealth" in the above quote, it would speak precisely to the petitioners' allegations in the matter *sub judice*. Further, the abstract questions presented by the Complaint herein are certainly limited to "generalized grievances more appropriately addressed by the representative branches" of the Mississippi Legislature which has done so by enacting 1985 Laws 27, Ch. XXIII. (J.A. 97-98). Petitioners have alleged that the same exact injury has been and will continue to be suffered by each and every petitioner in whatever school district, whether municipal or county, which are, pursuant to the face of the Complaint, located in separate and distinct counties with multi-faceted differences. As the Court stated in *Valley Forge, supra,* at 70 L.Ed.2d 709-710, Art. 3:

> The requirement of actual injury . . . tends to assure that the legal questions presented to the Court will be resolved not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to the realistic appreciation of the consequences of the judicial action.
>
> * * *
>
> Were the federal courts merely publicly funded forms for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of 'standing' would be quite unnecessary. But the 'cases and controversies' language of Article III forecloses the conversion of courts of the United States into judicial versions of college debating forums.

To say that each petitioner in the instant case can allege the exact same injury and could prove same on behalf of each of the other petitioners borders on the incredible. See Footnote 30, *supra*.

The concrete adverseness which sharpens the presentation of issues is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury

itself. *Baker v. Carr,* 269 U.S. 186, 204, 7 L.Ed.2d 663, 678, 82 S.Ct. 691 (1962). *Valley Forge, supra,* at 718.

No charge has been made here that because of any alleged acts regarding the Chickasaw Cession Lieu Lands or the funds derived from the sale thereof that these acts should be subject to strict scrutiny. That is because such an allegation could not be made in good faith. The only contention is that the school children do not receive a minimally adequate education and this is unsupported by any contention that the children do not learn "the three R's" because of any alleged actions regarding the Chickasaw Cession Lieu Lands. Nor is there any allegation or contention that due to said alleged acts the children of the respective districts are thereby deprived of some explicit protection under the Federal Constitution or of an implicitly protected right. To the extent that the acts of the Mississippi Legislature and the people of the State of Mississippi by adopting Section 212 of the Constitution of this state have resulted in unequal expenditures between different school districts both within and without the Chickasaw Cession, it cannot be said that the system is irrational and invidiously discriminatory. To the contrary, the state legislature has as late as 1985 attempted to make the funding equitable to all school districts as previously shown.[31] *cf. San Antonio School District, supra,* U.S. at 410-411, L.Ed.2d at 55.

To summarize, as this Court has so aptly found in *Holt Civic Club v. Tuscaloosa,* 439 U.S. 60, 70-71, 58 L.Ed.2d 292, 302, 99 S.Ct. 338 (1978):

" 'The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its

31. § 37-19-1, *et seq.* of the Miss. Code of 1972, as amended (1985) and 1985 Miss. Laws 27, Ch. XXIII.

application to a particular geographical or political subdivision of a state. *Fort Smith Light Co. v. Paving Dist.,* 274 U.S. 387, 391, 71 L.Ed. 1112, 47 S.Ct. 595 (1927). Rather, the Equal Protection Clause is offended only if the statute's classification "rests on grounds wholly irrelevant to the achievement of the states' objective." *McGowan v. Maryland,* 366 U.S. 420, 425, 6 L.Ed.2d 393, 81 S.Ct. 1101, 17 Ohio Ops. 2d 151 (1961), *Katch v. Board of River Part Pilots Comm'rs.,* 330 U.S. 552, 556, 91 L.Ed. 1093, 67 S.Ct. 910 (1947).' "

Certainly in the matter *sub judice,* the State of Mississippi has acted in a relevant manner in regard to the Chickasaw Cession Lieu Lands and the funds derived from the sale thereof. It has continued to pay interest on the corpus of the trust although it was lost as a result of the Civil War. Certainly it could sell the lieu lands and even Congress acted to approve this. Certainly it can pass an act increasing the amount paid to the respective school districts in the Chickasaw Cession counties as it did in 1985. The state has attempted to provide funds to those districts through legislature enactments and constitutional provisions. The fact that these funds are not in such amounts as petitioners desire is irrelevant. What is in issue here is a direct attack on the way the State of Mississippi has chosen to raise and disburse the funds to the respective districts in the Chickasaw Cession Counties. The Court should not interfere in the complex problem of financing and managing a statewide public school system and the Mississippi Legislature's efforts to tackle the problem should be entitled to respect. *San Antonio, supra,* 411 U.S. at 42, 36 L.Ed.2d at 48. As this court has said:

> The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various states and we do no violence to the values of federalism and separation of powers by staying our hand.

Id., at 58, 36 L.Ed.2d at 57, 93 S.Ct. 1278.

The mere fact that the Constitution of the State of Mississippi has not been changed to adjust the legislative appropriation under Section 212 to keep pace with rising inflation is not a violation of the Equal Protection Clause of the Fourteenth Amendment. *Papasan, et al. v. United States,* 756 F.2d 1087 (1985).

It is a truism of constitutional law that the Equal Protection Clause, despite its name, does not require that all citizens be treated in a precisely equivalent manner under all circumstances. Unequal treatment is justified when it passes muster under judicially enunciated tests, and generally one of two such standards is employed.

Because the "unequal" government action challenged here by petitioners neither impinges upon fundamental rights nor affects members of suspect classes, the most damaging of the tests, strict scrutiny, is inappropriate. See: *San Antonio School District v. Rodriguez,* 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973). *cf. Zablocki v. Redhail,* 434 U.S. 374, 54 L.Ed.2d 618, 98 S.Ct. 673 (1978). Instead the proper test to be applied is the less rigorous rational-connection test as supplied by the Fifth Circuit. *Papasan,* at 1095. *See: Califano v. Aznavorian,* 439 U.S. 170, 58 L.Ed.2d 435, 99 S.Ct. 471 (1978). Petitioners concede the propriety of rational connection as the constitutional measure of this case but stress that the Court should

adopt some "intermediate review standard." Brief of petitioners at pp. 40-48.

Under the rational-connection test, the challenged "unequal" treatment is justified if intended to further a legitimate state interest to which it is rationally related. The means chosen to further the state interest need not be the only means nor the best. See, e.g., *New York City Transit Authority v. Beazer,* 440 U.S. 568, 59 L.Ed.2d 587, 99 S.Ct. 1355 (1979); *Washington v. Yakima Indian Nation,* 439 U.S. 463, 58 L.Ed.2d 740, 98 S.Ct. 3120 (1979). Where the "unequal" treatment is the product of legislation, as is the case here, a strong presumption of validity attends the challenged legislation. *Califano v. Aznavorian, supra, Noland v. Ramsey,* 597 F.2d 577 (5 Cir. 1979). Finally, legislation challenged under the equal protection clause is valid if rationally related to any legitimate state interest, even if the state interest is never precisely enunciated by the legislature. *New Orleans v. Dukes,* 427 U.S. 297, 49 L.Ed.2d 511, 96 S.Ct. 2513 (1976).

Given the presentation of statutory validity, the petitioners' burden is to "convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true." *Vance v. Bradley,* 440 U.S. 93, 111, 59 L.Ed.2d 171, 99 S.Ct. 939 (1979).

Petitioners' brief relies heavily upon statistical data and develops such information very well. However, *Petitioners' brief in no manner meets the required burden of proof.* To the contrary, Petitioners' brief throughout demonstrates that reasons for the distinction between Chickasaw Cession and Choctaw Cession School Districts did exist and there is no way they could not *reasonably be conceived to be true. Vance v. Bradley, supra.*

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit should be affirmed on the basis of the opinion of said Court.

Respectfully submitted,

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I, R. Lloyd Arnold, a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Brief for the Respondents to the following counsel:

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This, the 27th day of February, 1986.

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No. 85-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

B. H. PAPASAN, *et al.*,

Petitioners,

v.

WILLIAM A. ALLAIN
GOVERNOR, STATE OF MISSISSIPPI, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON THE MERITS FOR RESPONDENTS DICK MOLPUS AND CONSTANCE SLAUGHTER-HARVEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

These respondents, Dick Molpus and Constance Slaughter-Harvey (hereinafter "the Secretary of State Respondents"), are filing separate briefs because the Attorney General of the State of Mississippi—who is also a Respondent and, with the other respondents, is hereinafter referred to as "the Attorney General Respondents"—has declined to present to this Court the views and position of the Secretary of State Respondents.

SUMMARY OF THE ARGUMENT

Respondents are the statutorily designated supervisors of Mississippi's school lands trust. The trust is valid, subsisting, and, in the Chickasaw Cession, it is violated annually. The trust beneficiaries receive a fraction of the income to which they are admittedly entitled, in violation of the law of trusts. Furthermore, these acts are discriminatory and have no rational basis. The prospective injunctive relief sought by the Petitioners should be granted.

ARGUMENT

A. INTRODUCTION

In Mississippi, where federal funds make up a larger percentage of school funding than in any other state, a key element of school funding is the sixteenth section school lands trust established by Congress. By failing to provide the children of the Chickasaw Cession the full benefit of this trust, the State has failed to comply with its obligations as trustees of the school lands trust. Furthermore, Mississippi's schoolchildren are divided into two groups, one with a fully funded

trust and one without, and this denial of equal treatment to the children of the Chickasaw Cession is without a rational basis.

The Secretary of State Respondents are the state officials most directly charged with supervision of Mississippi's school lands trust. Respondent Dick Molpus, the Secretary of State of Mississippi, is the elected public official presently charged with supervision and monitoring of the state's management of the corpus from this trust. *See* Miss. Code Ann. §7-11-2 (Supp. 1985) ("(T)he duties, responsibilities and title of (the office of the state land commissioner) are transferred to the office of secretary of state, who shall perform the duties heretofore performed by the elected state land commissioner for the State of Mississippi."); Miss. Code Ann. §7-11-11 (Supp. 1985) ("The secretary of state shall have charge of . . . all . . . public lands belonging to or under the control of the state"); Miss. Code Ann. §29-3-1(1) (Supp. 1985) ("The board of education (of each county) under the general supervision of the state land commissioner, shall have control and jurisdiction of said school trust lands and of all funds arising from any disposition heretofore or hereafter made.) (J.A.71). Respondent Constance Slaughter-Harvey, the Assistant Secretary of State of Mississippi responsible for the Public Lands Division of the Secretary of State's office, is the member of the Secretary of State's staff immediately responsible for matters involving the sixteenth section lands trust. *See* Miss. Code Ann. §7-11-6 (Supp. 1985) ("The secretary of state shall appoint a competent attorney to be designated as an assistant secretary of state, who shall have the responsibilities of performing the function of the former state land office. . . .").

The injury and discrimination visited upon the Chickasaw Cession and its schools has been a particular concern to the Secretary of State Respondents throughout their tenure in office. *See* State Auditor and Secretary of State of Mississippi, *Special Report on Chickasaw Cession School Districts* (1984) (J.A. 36-39) (hereinafter "*Chickasaw Cession Report*") (report by Respondent Molpus and by state auditor discussing lack of trust income in Chickasaw Cession counties).

B. THE CHICKASAW CESSION SCHOOLCHILDREN DO NOT RECEIVE THE TRUST INCOME TO WHICH THEY ARE ENTITLED

Prior to this case no state official of the State of Mississippi, charged as trustees of the school lands trust for the benefit of the schools in the Chickasaw Cession, has ever failed to recognize the validity and viability of the trust. The obligations imposed on the state by the trust have never been questioned. The Secretary of State expressly acknowledged the obligations of trustee by co-signing a 1984 report on the Chickasaw Cession schools. For several reasons, the legislature in 1985 confessed the breach of trust, gave a partial remedy of the breach, but this action did not completely remedy the wrong. The claim of breach of trust in this action is based upon the breach of these acknowledged duties. As the state officials charged with the administration of the school lands trust in Mississippi, in this and other contexts, these respondents must assert their validity. Hence, this separate brief.

To properly understand the claims brought on behalf of the Chickasaw Cession schoolchildren, it is

crucial to keep in mind that the historical antecedents to the present plight of the schoolchildren—though fascinating—are not critical to evaluating the validity of their trust claims. This lawsuit concerns, if you will, the present tense only. At present, there exists a school lands trust which state officials, as successor trustees, have a current obligation to annually pay proceeds in favor of the beneficiary school children in an amount commensurate with what the original corpus would have generated had the state preserved rather than converting the corpus. The litany of prior mismanagement affects these current trustees' duty to provide proper trust proceeds today and tomorrow not one iota. It is this present trustees' duty which is being breached, and it will continue to be breached in the future unless the schoolchildren are granted prospective injunctive relief to prevent the continuing breach of these trustee obligations.

There can be little doubt but that the school lands trust is a binding, subsisting trust that can be enforced here to remedy the unconscionable deprivation suffered by the Chickasaw Cession schoolchildren. It was clearly the intent of Congress to foster public education and to provide an inviolate basis for its preservation. Trustee state officials who properly administer the trust help prevent public education from suffering the sort of fiscal disgrace which is visited upon the schools and schoolchildren of the Chickasaw Cession. Based upon an estimate from 1983 figures, the Chickasaw Cession schools should have received approximately seven million dollars in 1983, instead of the sixty-six thousand dollars they were given. Cognizance of the untenable fiscal situation in the Chickasaw Cession schools prompted publication by this

office of the Special Report on the Chickasaw Cessions Schools. Our aim in issuing that report was to prompt the Mississippi Legislature to furnish relief to those schools and schoolchildren who are the victims of the breaches by state officials of the school lands trust.

Following that report and the initiatives by the legislative delegation from the Chickasaw Cession area, the Mississippi Legislature passed a bill providing for increased payments to the Chickasaw Cession schools in lieu of the school lands trust income. The bill straightforwardly admitted that until that time the Chickasaw Cession schools had been receiving completely inadequate income. The bill attempted to ameliorate conditions, but despite well-intentioned efforts fell short of correcting the current and ongoing breach of the school lands trust obligations by trustee state officials. In place of the sixty-six thousand dollars previously allotted the Chickasaw Cession schools. the new bill provided for one million dollars to be paid in 1985, that amount to be increased each of the next four years by one million dollars, so that in 1989 the Chickasaw Cession schools would receive five million dollars. Aside from the fact that the ultimate amount is still two million dollars shy of the sum required in 1983, there is simply no guarantee that the promised appropriation will be made each year. In addition, it is anticipated that the Choctaw Cession trust proceeds will increase dramatically because of a renewed focus on sound trust management. Therefore, the Chickasaw-Choctaw disparity will in fact widen in the next decade. Only an injunction of the nature requested in

this lawsuit can prevent the present and future breaches of the school lands trust by state officials.

C. THE CHICKASAW CESSION SCHOOLCHILDREN ARE BEING DENIED EQUAL PROTECTION

The 1984 report by Respondent Dick Molpus and State Auditor Ray Mabus on Chickasaw Cession schools sets forth in graphic terms the discrimination suffered by the Chickasaw Cession's schoolchildren. *Chickasaw Cession Report* (J.A.37-46). The report compared 1982 and 1983 receipts from the school lands trust for adjoining counties completely inside and completely outside the Chickasaw Cession. For example, Lafayette County, within the Cession, received 36¢ per acre from the trust, while Grenada County, outside the Cession, received $41.83 per acre. *Chickasaw Cession Report* (J.A. 37-38.) By increasing the funding to the Chickasaw Cession in 1985, the state legislature reduced but did not erase this discrimination. In the first place, the 1985 legislation did not provide sufficient funding to give the Chickasaw Cession school children income equivalent to the fully funded trust income received in the rest of the state. (P.B. 11-12).[1] In the second place, continued funding of the 1985 legislation is at the discretion of a legislature that is desperately strapped for funds.

The discrimination suffered by the Chickasaw Cession schoolchildren clearly divides the schoolchildren of Mississippi into two groups, and denies one group the benefits conferred upon the other group. As this Court has recently stated, "The Equal Protection

[1] References to Petitioners' Brief on the Merits will be designated by (P.B. __).

Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center*, ___ U.S. ___, 87 L.Ed.2d 313, 320 (1985). To treat individuals differently without violating restrictures of equal protection, the state must show that the individuals are relevantly different; for that reason, equal protection requires that government classifications be rationally-related to a legitimate state interest.

There is no principled way to distinguish the Chickasaw Cession schoolchildren from schoolchildren in the rest of the state. With the exception of the school lands trust, schools in both sections of the state are similarly funded.

CONCLUSION

The Secretary of State Respondents are the Mississippi public officials primarily charged with administration of the school lands trust in the state, including the Chickasaw Cession School Lands Trust. Heretofore, those trusts were recognized by the state as valid and subsisting. Any view to the contrary should be rejected by this Court. This separate brief is filed to urge the Court to uphold the trusts and to grant the prospective injunctive relief sought on behalf of the schoolchildren of the Chickasaw Cession. All public schoolchildren in Mississippi, regardless of where they live, should have the opportunity for an equal quality education.

Respectfully submitted,

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of the State of Mississippi
Pro Se

Constance Slaughter-Harvey
Assistant Secretary of State
of the State of Mississippi
Pro Se

CERTIFICATE OF SERVICE

WE, DICK MOLPUS AND CONSTANCE SLAUGHTER-HARVEY, pro se respondents, do hereby certify that we have this day mailed, postage prepaid, three true and correct copies each of the Brief on the Merits to:

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This, the 3rd day of March, 1986.

/s/ Dick Molpus
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of the State of Mississippi

/s/ Constance Slaughter-Harvey
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Assistant Secretary of State
of the State of Mississippi

No. 85-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

B. H. PAPASAN,
SUPERINTENDENT OF EDUCATION, *et al.*,
Petitioners,

v.

WILLIAM A. ALLAIN
GOVERNOR, STATE OF MISSISSIPPI, *et al.*,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

SUMMARY OF ARGUMENT

The court below and the Mississippi Attorney General respondents treat this case as one primarily seeking retrospective relief from the state. But that was never the focus of the complaint, and no such claim is before this court. The issue before this court is whether state officials will be made to cease continuing annual violations of their obligations as trustees of the school lands trust in the future in conformity with governing federal law.

The school lands trust was a congressional precondition of state sovereignty, created and regulated by federal law. These binding federal obligations are, like all public trusts, enforceable by a court of equity at the behest of the beneficiaries.

Past acts in violation of this express trust by predecessors in office of respondent state officials—consisting of conversion of trust funds to the use of the state, abandonment of reversionary interests in leased trust lands, and improvident loans of trust funds—imposed on respondents a continuing duty to provide trust income commensurate with a properly managed trust. This obligation has continued to be legislatively acknowledged by the state since the wrongful acts occurred. As recently as 1985, the obligation and the fact that it was not being honored were admitted by one of the respondents who violate this acknowledged trust obligation annually.

Petitioners' claim for prospective equitable relief is not barred by the eleventh amendment. Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and its progeny, plaintiffs may obtain injunctive relief that requires the state trustees to conform their future conduct in the administration of the school lands trust to the requirements of federal law. That such prospective relief may have an inevitable effect on the state treasury is irrelevant to the eleventh amendment. Rather, prospective relief is neces-

sary and appropriate to vindicate the supremacy of federal law; any effect on the state treasury is incidental to that end.

ARGUMENT

I. The School Lands Trust Created By The Federal Land Grant Scheme Is A Binding Federal Obligation Enforceable By A Court Of Equity

The Attorney General respondents—the Governor, the Attorney General, and the Superintendent of Education—are operating under a number of misapprehensions about this action generally and about the nature of the trust claim in particular. One important misapprehension relates to the proper party defendants for this action. The Attorney General respondents suggest that "the trust . . . is administered by the legislature of the State of Mississippi. . . ." and that the legislature is the only proper defendant. (Attorney General Respondents' Brief at 18-19).[1] This is, to say the least, a peculiar idea as to which branch of government performs ministerial functions. The state officials who were made defendants include the chief executive officer of the State of Mississippi--the Governor—and the executive officers primarily charged with management and supervision of the state's education system—the State Superintendent of Education and the State Board of Education as it was then constituted. Most importantly, the defendants include the executive officers charged with management and supervision of Mississippi's federal school lands trust. (Secretary of State Respondents' Brief at 2-3). The administration of a trust is in the truest

[1] References to the brief of the Attorney General respondents are indicated by (Attorney General respondents' Brief ____). Reference to the brief of the Secretary of State Respondents, who are the Secretary of State and the Assistant Secretary of State, are indicated by (Secretary of State Respondents' Brief ____). References to the petitioners' brief are indicated by (Petitioners' Brief ____).

sense a ministerial, hence executive, function. The executive officers charged with the responsibilities of trustee are the defendants sued.

The Attorney General respondents are operating under similar confusion as to the nature of the claims stated in the complaint. They make much out of the Treaty of Pontotoc Creek, and act as if the petitioners' position depended upon an attack upon that treaty. (Attorney General Respondents' Brief at 11). This apparently underlies the Attorney General respondents' contention that the failure to reserve the sixteenth sections is somehow "[t]he crux of the allegations" of the complaint. (Attorney General Respondents' Brief at 3). While the Attorney General respondents' creative misreading of the treaty is of academic interest,[2] it has no bearing on the actual claims presented. The claims in this case--for breach of trust, breach of the contracts clause, and violation of the equal protection clause—all arise from actions by the state officials in mishandling the trust property that was given to the state in trust. Petitioners' claims are grounded in the *present* failure, *reoccurring* each year, of these trustees to honor the obligations of the trust.

Both the court below and the Attorney General respondents in their brief in this Court ignore the nature of the petitioners' federal school lands trust claim. The Attorney General respondents seem to treat the school lands trust as a mere precatory gift. On this premise, it is argued that Congress had no power to regulate sub-

[2] The two main treaties of Indian cession of the 1830's in Mississippi, the Treaty of Pontotoc Creek and the Treaty of Dancing Rabbit Creek, had essentially identical provisions directing that the lands of the cession be sold for the benefit of the Indians. Both provided for sale under applicable lands sales statutes, and thus implicitly provided for reservation of sixteenth sections. In the Pontotoc Cession, the school lands were *not* reserved, whereas in the Dancing Rabbit Creek Cession they were.

sequent alienation and waste of the trust lands and their proceeds. (Attorney General Respondents' Brief at 13-14).[3] The court below states first that all wrongful acts occurred one hundred and thirty years ago, thereby ignoring the breaches that occur annually; and second that the trusts are creatures of state law, thereby ignoring the origin and history of the grants. *Papasan v. United States*, 756 F.2d 1087, 1094 (5th Cir. 1985)(P.A. 23). Neither the characterization by the Fifth Circuit or the Attorney General respondents of the school lands grant is accurate. The grant of section sixteen lands to the states to administer in trust for the benefit of the public schools was no mere gift.[4]

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[3] The Attorney General respondents also argue that the actions of the trustees were prudent and that no fraud or waste took place. Aside from the fact that the allegations of the complaint must be taken as true in view of the status of the pleadings, this argument ignores the conversion of the trust corpus mandated by the Mississippi Legislature in 1856 that occurred when the funds from the sale were deposited in the treasury's general fund. 1856 Miss. Laws 141 ch. LVI (J.A. 87). This also ignores the give-away of the reversionary interests in the leased trust lands, mandated in 1854. 1854 Miss. Laws 348 ch. CCXVII (J.A. 86). It also raises factual and legal questions that cannot be determined on the pleadings. Because this case was dismissed on the pleadings under Fed.R.Civ.P. 12(b)(6), the complaint's allegations of fraud and waste must be taken as true. *Hishon v. King & Spaulding*, ___ U.S. ___, 81 L.Ed.2d 59, 65 (1984); *Conley v. Gibson*, 385 U.S. 42, 45-46 (1957).

[4] Presumably, the Attorney General respondents would argue that the school lands trust grant was an obligation and not a "gift" if the issue were the obligation of the United States to provide the land. Of course, the compact was not a gift but rather did impose judicially enforceable obligations. "Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act become a *jus in re* judicial in its nature, and under the compliance and protection of the judicial authorities. . . ." *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 179 (1855).

Despite the wealth of contrary federal authority cited in petitioners Brief On The Merits (Petitioners' Brief at 16-24), the Attorney General respondents contend that Mississippi state officials cannot be held to the duties of trustees of the school lands trust. As sole authority for the proposition, they rely on the following language from *Alabama v. Schmidt:*

> The gift to the State is absolute, although, no doubt, as said in *Cooper v. Roberts*, 'there is a sacred obligation imposed on the public faith.' But that obligation is honorary like the one discussed in *Conley v. Ballinger*, 216 U.S. 84, and even in honor would not be broken by a sale and substitution of a fund, as in that case; a course, we believe, that has not been uncommon among the States.
>
> -232 U.S. 168, 174 (1914)(Attorney General Respondents' Brief at 13).

This language in *Schmidt* must be understood in the context of the fact situation presented by that case, and the legal positions adopted by the parties. In *Schmidt*, Alabama was attempting to invalidate a conveyance of specific sixteenth section land it had made to Schmidt's predecessors. There was no question but that Alabama had knowingly and voluntarily made the conveyance for valuable consideration and that Schmidt and her predecessors had possessed the property for a period of over forty years. Brief of Plaintiff in Error at 2, *Alabama v. Schmidt*, 232 U.S. 168 (1914). The legal theory, under which Alabama was attempting to invalidate Schmidt's title, was that Alabama was without power under federal law to have made this bargain with Schmidt's predecessors, and that the conveyance was therefore void.[5] The *Schmidt* Court

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[5] The State of Alabama's position that it could not convey the lands was based on a contention that it did not have title even as trustee,

strongly refuted the notion that states were unable to sell school lands as part of overall trust management. It is not for naught that, in the same sentence characterizing the trust as "honorary", the Court notes that "a sale and substitution of a fund" is the conduct that is approved. *Schmidt* involved no allegations of trust mismanagement and no injury to any trust beneficiaries was implicated. The Court was not construing the trust relationship between the state trustee and the schoolchildren beneficiaries.

The Court in *Alabama v. Schmidt* also described the trust as "honorary" like a trust construed in *Conley v. Ballinger*, 216 U.S. 84 (1909). *Conley* involved an enactment by which Congress authorized the sale of land which was a cemetery for the Wyandotte tribe. The tribe would receive the proceeds of sale to be distributed ratably among the tribe members. *Conley* did *not* involve a breach by the United States of any of its obligations as trustees—fair and reasonable compensation would be received by the tribe for the sale of the land. Brief of Appellees at 4, *Conley v. Ballinger*, 216 U.S. 84 (1909). Conley sought injunctive relief to prevent the sale of the cemetery containing her ancestors. The Court held that the United States was not bound to respect Wyandotte preferences as to whether specific property would be retained or sold.[6]

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and that the federal government retained title to the school lands even after the creation of the trust. Brief of Plaintiff in Error at 9, 15-16, *Alabama v. Schmidt*, 232 U.S. 168 (1914). A similar contention was made by the state in *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302-303 (1976), in which Arizona contended the trust prohibited conveyance of a leasehold which provided a compensable interest to the lessee in the event of condemnation. While rejecting any such limitation on a state's ability to convey trust property, the *Alamo* Court nonetheless made it clear that the trust was valid and enforceable.

[6] While Congress did require the consent of the various counties in the Chickasaw Cession prior to any sale of the lieu lands by the state, 10 Stat. 6 ch. XXXV (1852) (J.A. 63), this prerequisite was ignored by state officials. 1854 Miss. Laws 348 ch. CCXVII (J.A. 86).

The trust was thus "honorary"—*not* in the sense that there was no enforceable trust or that fair compensation need not be given, but rather—in the sense that the United States had plenary power to keep property or convert it to trust funds at will. 216 U.S. at 90.

Close attendance to the situations presented by both *Conley* and *Schmidt* reveal clearly what the Court meant by "honorary" in this trust context. In both cases, beneficiaries of actual trust obligations—Alabama schoolchildren and the Wyandotte tribe—receive just compensation for the conveyance of the trust property. In public trusts of this "honorary" character, the Court holds that the trustee's duty to retain specific trust property is only "honorary". These cases do not suggest that the trustee's duty to properly manage the trust is anything other than binding and enforceable.

Rather than a "substitution of a fund" to replace trust lands that are sold, Mississippi disposed of the reversionary interest in trust lands for inadequate consideration, converted the proceeds and comingled them with the general funds in the state treasury. 1856 Miss. Laws 141 ch. LVI (J.A. 87). After converting the funds by depositing them in the state treasury, the state officials used a part of the funds for loans to the railroads. 1856 Miss. Laws 141 ch. LVI (J.A. 91). Mississippi thus inverted the congressional policy of the school lands trust: "The interests of the public schools have already been considered paramount to those of railroad companies in grants made to aid in their construction. The one speaks for intellectual, the other for material, development." *Minnesota v. Hitchcock*, 185 U.S. 375, 401 (1901).

Lassen v. Arizona, 385 U.S. 458 (1967), disposes of any doubt about the binding nature and enforceability of the school lands trust. *See also Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302-03 (1976). In *Lassen*, the Court held that the binding nature of the trust meant that the

state highway agency could not simply take school trust land for highway purposes without compensating the trust for the value taken by that use. Thus the *Lassen* Court upheld conditions upon the sale of trust property. Mississippi's trust also had conditions on sale. Congress, in authorizing sale of the lieu lands, prohibited any subsequent sale without the consent of the Chickasaw Cession beneficiaries and provided further that all sale proceeds were to be held in trust for those same beneficiaries. 10 Stat. 6 ch. XXXV (1852)(Authorization of Sale of Lieu Lands) (J.A. 63). In selling these lands, Mississippi state officials ignored both these conditions and the duty (imposed by the law of trusts) to maintain and properly manage the funds realized from the sales. Petitioners' Brief at 8. If the Attorney General respondents' theory was correct, and the state were free to dispose of school trust lands without federal restrictions, *Lassen* would necessarily have been decided the other way.[7]

The Mississippi school lands trust is a binding federal obligation arising from the Georgia Compact and the Mississippi Enabling Act that cannot be evaded by the state officials. "The dedication, we repeat, was special and exact. . .; the United States being the grantor of the land,

[7] The fact that *Lassen* was decided under a later, slightly more specific land grant statute is immaterial. "Congress used the same phrase substantially in nearly every one of the school grants, and it was the manifest intention to place the states on the same footing in this matter. The same clause, relating to the same subject, and enacted in pursuance to the same policy did not have one meaning in one grant and a different meaning in another. . . ." *United States v. Morrison*, 240 U.S. 192, 255 (1915). Both the language of the grants and the restrictions placed on the states in the administration of the trusts in Arizona and Mississippi are similar in import. The fact that more specific restrictions (not material here) were imposed on Arizona is the result of the continuing efforts by Congress to make the sort of boondoggle perpetrated by the State of Mississippi in this case more difficult to achieve. But these additional specifications form no basis to question the application of *Lassen* to this case.

could impose conditions on their use. .a . ." *Ervien v. United States*, 251 U.S. 41, 47-48 (1919).

The school lands trust claim arises from the beneficial interest in the school lands trust created by Congress in a series of compacts and statutes. Accordingly, it must be judged under traditional principles of equity. *United States v. Swope*, 16 F.2d 215, 217 (8th Cir. 1926) ("The trust was imposed on [the state] by an act of Congress, but the same equitable rule of contruction applies to both public and private grants."). Under those principles, the land grant statutes created a public trust: "All revenues from the sale or lease of the lands was impressed with a trust in favor of the public schools." *Andrus v. Utah*, 446 U.S. 500, 523-24 (1980). (Powell, J. dissenting). The beneficiaries of that trust are the schoolchildren of the Chickasaw Cession[8]—the petitioners in this Court. Their suit is one in equity to preserve, protect and obtain the benefits of the trust. It is brought pursuant to the traditional right of a trust beneficiary to invoke the jurisdiction of acourt of equity to enforce the beneficial interest in the trust. 4 *Pomeroy's Equity Jurisprudence*, § 1018 at 2, § 1025 at 49 (5th ed. 1941). In addition, Mississippi law delegates to plaintiff school officials responsibilities for local management of the school lands trust. *Miss. Code Ann.* §§ 29-3-1; 29-3-17; 29-3-57; 29-3-59 (Supp. 1985) (J.A. 71-74). Accordingly, like any trustee, they may invoke the jurisdiction of an equity court to determine their obligations under the trust.

[8] The Attorney General argues that the plaintiffs have no standing. (Attorney General Respondents' Brief at 30-35). This argument is hard to understand. Clearly, the school children and their representatives have alleged the requisite Article III standing when they alleged that they continue to receive substantially less school lands trust money than they should but for the illegal actions of the defendants. The fact that the students lack the educational advantage that money can buy—more teachers, newer and better facilities, more books, etc.—establishes the injury-in-fact necessary for standing.

The respondents, who are the trustess, have a continuing obligation to fulfill the terms of the trust. This obligation is breached anew each time the trustees fail to provide the beneficiaries with the proceeds due from that trust. *See* 4 *Pomeroy's Equity Jurisprudence* §§ 1067 at 182-85, 1080 at 229 (5th ed. 1941) (continuing duty of trustee). The fact that this obligation has been breached and the trust violated each year since 1856 is no reason to refuse enforcement of the trust in the future. Not only has there been no repudiation of the obligation by the state or its officials, the obligation—as well as the failure to fulfill it—has continued to be acknowledged up to the present day. One of the respondents, the Secretary of State, acknowledges this continuing obligation in his separate brief. (Secretary of State Respondents' Brief at 3-5). The State of Mississippi acknowledged this continuing obligation by legislative act in 1985. Furthermore, the Secretary of State and the State of Mississippi acknowledged that this continuing obligation is not being fulfilled. Having failed to fulfill this obligation for 130 years, having acknowledged the failure to fulfill the continuing obligation, and having refused to fulfill the continuing obligation it would seem that prospective injunctive relief is not only appropriate, it is mandated.

Further, this equitable claim for the enforcement of the trust is a claim of federal right governed by purely federal standards. Thus, in *Ervien,* this Court rejected New Mexico's argument that a suit to enforce the school lands trust "is no more than an attempt to interfere with the due administration of a trust estate by the trustee, the state. . . ." 251 U.S. at 46-47. The Court made clear that: "We need not extend the argument or multiply considerations." 251 U.S. at 48. "[T]he United States, being the grantor of the lands, could impose conditions on their use. . . ." 251 U.S. at 48. And, "the United States has a continuing interest in the administration of both the lands

and the funds which derive from them" *Lassen,* 38 U.S. at 460.

II. The Eleventh Amendment Does Not Bar Prospective Relief For The Continuing Violations Of The School Lands Trust And The Equal Protection Clause

The court below erred in dismissing those parts of the suit seeking prospective injunctive relief against state officials for the continuing violations of the school lands trust and the equal protection clause. Both the court below and the Attorney General respondents in their brief rely on language from *Pennhurst State School v. Halderman,* 465 U.S. ___, 79 L.Ed.2d 67 (1984), that suits against state official that would operate against the state treasury are barred by the eleventh amendment. *Pennhurst,* 79 L.Ed.2d at 79. But *Pennhurst* dealt with a pendent state-law claim. This case concerns only claims of federal statutory and constitutional law. The trust claims seek to enforce a trust created by acts of Congress; the contracts clause claims and the equal protection clause claims seek to enforce rights secured by the United States Constitution. This suit therefore falls within "the rule permitting suits alleging conduct contrary to 'the supreme authority of the United States. . . .' " *Pennhurst,* 79 L.Ed.2d at 80 (quoting *Ex parte Young,* 209 U.S. at 160). A "federal court may award an injunction that governs the [state] official's future conduct. . . ." 79 L.Ed.2d at 80 (citing *Edelman v. Jordan,* 415 U.S. 651 (1974)).

The Attorney General respondents' reliance on the fact that the state was originally named as a defendant is also misplaced. "[T]he fact that the State should have been dismissed . . . does not mean that [the action] may not stand against other parties who are not immune from suit." *Florida Department of State v. Treasure Salvors,* 458 U.S. 670, 684 (1982); *see Alabama v. Pugh,* 438 U.S. 781, 782-83 (1978). There is only a bar to suit if there is no possible remedy *against any party* that comports with the limitations of the eleventh amendment.

The relief by which the petitioners seek to vindicate these federal rights is purely prospective. (Petitioners' Brief at 34-39). For that reason, this suit is not barred by the eleventh amendment as construed in this Court's cases from *Hans v. Louisiana,* 134 U.S. 1 (1890) to *Atascadero State Hospital v. Scanlon,* 473 U.S. ___, 87 L.Ed.2d 171 (1985). However, it seems on the face of it anomolous to apply modern eleventh amendment jurisprudence to acts of Congress passed in the first half of the nineteenth century. The Congresses which set up the trusts upon which Mississippi's trust was modeled acted *prior* to the ratification of the eleventh amendment. *See Cooper,* 59 U.S. at 177 (Petitioners Brief at 16-17). The Congresses which established the principles that would govern the school lands trusts would necessarily have understood, under then-governing law, that these trusts were enforceable in a court of equity. Congress would not have considered either sovereign immunity or the eleventh amendment a bar to suits to enforce these trusts.

Sovereign immunity would not have been considered a bar for two reasons: (1) under then-prevailing law, either law received from England,[9] or law of the colonial period,[10] sovereign immunity did not bar suits in equity to compel the sovereign to perform its duties; and (2) the compacts that created these trusts were essential pre-conditions of

[9] In England, official action could be compelled by mandamus, which was even available to command the Lords of the Treasury to make payments. Jaffe, *Judicial Control of Administration Action* 211 (1965); *see Ellis v. Earl Grey,* 6 Sim. 214, 223, 58 Eng.Rep. 574, 577 (Ch. 1833) (the Lords of Treasury enjoined to ensure certain fees would be payable only to plaintiff); *Rex v. Barker,* 3 Burr. 1265, 1267, 97 Eng.Rep. 823, 824-25 (1762) (mandamus "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.").

[10] In the colonial period, the vast majority of the colonies were subject to suit; often their charters of or constitutions explicitly provided so. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 Colum.L.Rev. 1890, 1896-98 (1983).

a state's sovereignty, irrevocably binding a state to the compacts' terms on entry into the union.[11] It is not logical that a *condition* of sovereignty (such as sovereign immunity) could limit an *irrevocable pre-condition* of sovereignty itself. Nothing in the history of these trusts, the enabling acts for the states, or the eleventh amendment itself suggests such an illogical construction.

Similarly, the eleventh amendment, as understood in the early nineteenth century, would not have been seen as a bar to a suit such as this. In discussing the reach of the eleventh amendment in *Cohen v. Virginia,* 19 U.S. (6 Wheat.) 265 (1821), the Court explicitly held that

> no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting by the instrumentality of its courts, the constitution and laws from active violation.
>
> *Cohens,* 19 U.S. at 407.

In *Cohens,* Chief Justice Marshall explained that the eleventh amendment was not intended "to maintain the sovereignty of a state from the degredation supposed to attend to a compulsory appearance before a tribunal," but rather to protect a state's interest in "consulting its convenience in the adjustment of its debts." *Cohens,* 19 U.S at 407 The Court's eleventh amendment cases of that era make explicit that the amendment did not undercut the supremacy and enforceability of federal law. *See Governor of Georgia v. Madrazo,* 26 U.S. (1 Pet.) 110, 123-24 (1828)(Court stressed that there was no allegation that state had acted in "violation of an act of Congress."); *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 739 (1824)(suggests

[11] *Cooper,* 59 U.S. at 178; *see Andrus,* 446 U.S. at 523 ("Congress imposed upon the state a binding and perpetual obligation. . . .") (Powell, J. dissenting).

that amendment would have "its full effect" if enforced only to its express terms).

To a nineteenth century Congress, neither sovereign immunity nor the eleventh amendment would have presented any bar to the enforcement of the rights created by the school lands trust. It seems illogical to impose as limits upon Congresses' action the judge-made rules of seventy-five years later as to the scope of the eleventh amendment (*Hans v. Louisiana*, 134 U.S. 1 (1890)) or one-hundred and fifty hears later as to abrogation of the eleventh amendment (*Atascadero State Hospital v. Scanlon*, 473 U.S. ___, 87 L.Ed.2d 171, 180 (1985)). In *County of Oneida v. Oneida Indian Nation*, 470 U.S. ___, 84 L.Ed.2d 169 (1985), this Court considered the possibility that the Non-intercourse Act of 1793 might have abrogated sovereign immunity, even though no express language of abrogation was used. The Court "[a]ssum[ed], without deciding that this reasoning was correct. . . ." *Oneida*, 84 L.Ed.2d at 190. The claims in *Oneida* were held barred, however, because they did not arise under the 1793 act. In the case at bar, the petitioners' claims arise directly from the late 18th and early 19th century acts of Congress creating those rights. The evidence is that Congress would not have understood the eleventh amendment to bar enforcement of the rights it created. Thus it would seem that the abrogation assumed to be present in *Oneida* is in fact present in the case at bar.

This Court, however, need not reach the issue of whether Congress intended abrogation because this suit is permissible under traditional notions of how the eleventh amendment works.[12] This is true because the petitioners seek

[12] The claims stated in the complaint do not run afoul of the eleventh amendment for several reasons. As stated in the text, these claims seek prospective, injunctive relief that is clearly allowed under this Court's eleventh amendment cases. Furthermore, the trust nature of the federal claims obviates any eleventh amendment problems. For the essence of the trust claim is that money representing the corpus of the trust does not belong to the state. As the Fifth Circuit has explained in an analogous context:

> The fund was not the property of the State. . . .It had been entrusted to a state agency only to hold and invest. . . .Under these circumstances the judgment. . . .ha[s] no true impact on the state treasury; the effect of paying over such trust funds for their intended purposes would be an ancillary one at best. Such payments are not prohibited by the Eleventh Amendment.

Schiff v. Williams, 519 F.2d 257, 262 (5th Cir. 1975) (award to improperly discharged student editor from fund composed of student activity fees held by state for support of student newspaper); *cf. Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982) ("since the state officials do not have a colorable claim to possession. . ., they may not invoke the Eleventh Amendment. . . .").

prospective, injunctive relief based upon a continuing breach of the federal statutes which created the trust. While the lower court recognizes that "a federal compact was created and breached over a hundred years ago," it then mischaracterizes the continuing annual breach of the same federal compact as a violation of the state law of trusts, and thereby rationalizes its failure to grant prospective relief. *Papasan*, 756 F.2d at 1094 (P.A. 23). The primary thrust of the complaint is prospective; the naming of the state and the request for compensatory relief were premised on the since-abandoned hope that the state (whose Secretary of State and chief official in charge of the school trust lands support petitioners' suit) might consent to suit.[13] Since consent was not obtained, those claims were abandoned in the briefs submitted to the Fifth Circuit.

[13] The subparagraph seeking compensatory relief is only one section of one paragraph amongst seven requesting relief. It appears in a section of the complaint addressed to the district court "[s]itting as a [c]ourt of [e]quity." (J.A. 23). That section asked the court to use its equitable powers flexibly to formulate appropriate remedies for the violation of the trust. (J.A. 25-26, 29-30).

There must be forms of prospective relief within the confines of the eleventh amendment which are appropriate to this case. As in *Ex Parte Young*, the state trustees could be "enjoined to conform [their] future conduct of that office to the requirement of the Fourteenth Amendment. . ." and federal law. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). There could be no eleventh amendment problem with an order requiring fair and equal administration of the current trust corpus[14] nor with an order upholding the validity and prospective enforceability of the trust. Or, using *Milliken v. Bradley*, 433 U.S. 267 (1977)(*Milliken II*), as a model, the court could require that the beneficiaries be made whole by the provision of sufficient educational and remedial programs to provide them with the educational benefits they would have had but for the continuing breach of the trust.

The choice between these various forms of permissible relief is one that properly belongs to the district court, exercising its equitable powers to structure appropriate relief in light of local conditions and the equities of the case. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). The suit must be allowed to proceed as long as some relief may issue without violating the eleventh amendment. The court below erred in prejudging the issue of appropriate relief under the guise of a jurisdictional ruling.

The fact that the state will have to expend funds in connection with such relief does not run afoul of this Court's cases from *Ex parte Young* through *Edelman*, *Milliken II*, and *Pennhurst*. As in *Edelman* and other welfare cases, a prospective order requiring state officials properly

[14] Such an order could be premised either on the equal protection claim or a ruling that the current trust corpus consisting of sixteenth section lands and their proceeds in the Southern, non-Chickasaw Cession part of the state be administered in trust for all the schoolchildren in the state.

to administer a disbursement program in the future necessarily requires the disbursement of funds from the state treasury. 415 U.S. at 667-68. But the Court has distinguished and approved "such a financial impact . . . where a federal court applies *Ex parte Young* to grant prospective declaratory and injunctive relief, as opposed to an order of retroactive payments. . ." 415 U.S. at 666 n.11.

The point is that "[b]oth prospective and retrospective relief implicate eleventh amendment concerns," but that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. ___, 88 L.Ed.2d 371, 377 (1985). Thus, the fact that an injunction ultimately results in the payment of money out of the state treasury does not convert the claim to one proscribed by the eleventh amendment. "State officials, in order to shape their official conduct to the mandate of the court's decrees, would . . . have to spend money from the state treasury . . . such an ancillary effect on the state treasury is a permissible and often *inevitable* consequence of the principle announced in *Ex parte Young*," *Edelman*, 415 U.S. at 668 (emphasis added). Such an order is ancillary to upholding the validity of the trust and enforcing the trust. It is not an end in itself, as is an award of damages. A request for monetary relief is "proper to the extent it [seeks] 'payment of state funds . . . as a necessary consequence of compliance *in the future* with a substantive federal-question determination. . .' " *Milliken II*, 433 U.S. at 289 (emphasis in original) (quoting *Edelman*, 415 U.S. at 668).

Indeed, if anything, this case is stronger than *Milliken II*. For the monetary relief awarded in *Milliken II* was intended to make whole the victims of a past constitutional violation that presumedly was to cease with the implementation of the other injunctive relief awarded by the court. Here, in contrast, both the violations and the effects of the past breach of the trust will continue indefinitely

unless monetary relief is ordered. The Chickasaw Cession schools will never receive their fair share of the trust that Congress has required for their exclusive benefit. As a result, the children that attend those schools will continue to receive a substandard education. Here, even more than in *Milliken II*, the harm as well as the remedy is prospective. While the shape of that remedy is yet to be determined, the eleventh amendment does not mean that no federal remedy may issue to stop the continuing violation of federal law and the continuing and future harm to the Chickasaw Cession schoolchildren.

CONCLUSION

The Court should reverse the judgment of the court of appeals, and remand the case for appropriate proceedings in the district court.

DATED: This, the 14th day of April, 1986.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. H. Freeland, III, counsel of record for petitioners, do hereby certify that I have tnis day mailed, postage pre-paid, three true and correct copies of Reply Brief for Petitioners to:

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This, the 14th day of April, 1986

/s/ T. H. Freeland, III
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